



MISSISSIPPI CODE 1972
Annotated

Regulation of Trade, Commerce
and Investments

UNIFORM COMMERCIAL CODE

(§ 75-4-101 to
§ 75-12-39)

Title 75

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME SIXTEEN A REGULATION OF TRADE, COMMERCE AND INVESTMENTS

(Uniform Commercial Code)

§§ 75-4-101 to 75-12-39

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2002 REGULAR AND
1ST EXTRAORDINARY LEGISLATIVE SESSIONS



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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the legislature, the attorney general's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2002 Replacement Volume 16A of the Mississippi Code of 1972 Annotated represents material appearing in both the original 1973 bound volume and the 1981 Replacement Volume 16A, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2002 Regular and 1st Extraordinary Legislative Sessions.

This volume contains the text of Chapters 4 through 12 of Title 75 of the Mississippi Code of 1972 Annotated, as amended through the 2002 Regular and 1st Extraordinary Legislative Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates up to April 30, 2002, and decisions of the appropriate federal courts with decision dates up to March 10, 2002. These cases will be printed in the following reporters:

Southern Reporter, 2nd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 5th Series: through 97 A.L.R.5th
American Law Reports, Federal Series: through 177 A.L.R.Fed
Mississippi College Law Review: through Volume 20, No. 1, p. 211
Mississippi Law Journal: through Volume 70, No. 2, p. 851

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

PUBLISHER'S FOREWORD

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

August 2002

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User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of your Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, as well as a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the state of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

The text of Chapter 394 is printed in Volume 1, on the pages following the Publisher's Foreword. In addition, Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and coop-

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eration with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully-annotated softcover volume, which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and are edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, which may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the

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Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation “§ 1-3-65,” the first digit (“1”) means the provision is in Title 1 (“Laws and Statutes”); the second (“3”) indicates Chapter 3 (“Construction of Statutes”); and the last two digits (“65”) mean the 65th section in that chapter (“Construction of terms generally”).

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute section or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, Ameri-

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can Jurisprudence Trials, American Law Reports, First through Fifth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
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CHAPTER 4

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PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

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§ 75-4-101. Short title.

This chapter may be cited as Uniform Commercial Code—Bank Deposits and Collections.

SOURCES: Laws, 1942, § 41A:4-101; Laws, 1966, ch. 316, § 4-101; Laws, 1992, ch. 420, § 72, eff from and after January 1, 1993.

Cross References — Regulation of banks and banking, generally, see §§ 81-5-1 et seq.

Comparable Laws from other States — Alabama Code, §§ 7-4-101 through 7-4-504.

Arkansas Code Annotated, §§ 4-4-101 through 4-10-104.

Georgia Code Annotated, §§ 11-4-101 through 11-4-504.

Louisiana Revised Statutes Annotated, §§ 6:311 et seq., 9:2095, 10:4-101 et seq.

Tennessee Code Annotated, §§ 47-4-101 through 47-4-504.

Texas Business and Commerce Code, § 4.101 et seq.

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 4, dealing with bank deposits and collections. 18 A.L.R.3d 1376.

Maintenance of computer terminal in retail store for purpose of effecting transfer of funds between financial institution and its depositors as conduct of banking business by store. 73 A.L.R.3d 1282.

Am Jur. 10 Am. Jur. 2d, Banks §§ 647, 705, 708, 720.

11 Am. Jur. 2d, Banks §§ 970, 972, 987, 988.

CJS. 9 C.J.S., Banks and Banking §§ 382 et seq., 269-271, 276.

§ 75-4-102. Applicability.

(a) To the extent that items within this chapter are also within Chapters 3 and 8, they are subject to those chapters. If there is conflict, this chapter governs Chapter 3, but Chapter 8 governs this chapter.

(b) The liability of a bank for action or non-action with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

SOURCES: Codes, 1942, § 41A:4-102; Laws, 1966, ch. 316, § 4-102; Laws, 1992, ch. 420, § 73, eff from and after January 1, 1993.

Cross References — Agreement with respect to applicable law, see §§ 75-1-105, 75-4-103.

Commercial paper, see §§ 75-3-101 et seq.

Provisions of division on commercial paper as subject to division on bank deposits and collections, see § 75-3-103.

Action or nonaction of collecting bank, see §§ 75-4-201 to 75-4-216.

Vicarious liability of bank for action or nonaction of subagents, see § 75-4-202.

Supply by depositary bank of missing indorsement, see § 75-4-205.

Warranties by customer or collecting bank on payment, acceptance, or transfer of item, see §§ 75-4-207, 75-4-208, 75-4-209.

When security interest of bank is subject to provisions of Chapter 9, see § 75-4-210.

Accountability of payor bank until final payment of item, see § 75-4-215.

Action or nonaction of bank which suspends payment or is affected by another bank suspending payment, see § 75-4-216.

Deferred posting; revocation of settlement and return of item, see § 75-4-301.

Payor bank's accountability for late return of item, see § 75-4-302.

Relationship between payor bank and its customer, see §§ 75-4-401 et seq.

Letters of credit, deferment of honor of documentary draft or demand for payment, see § 75-5-112.

Documents of title, see §§ 75-7-101 et seq.

Investment securities, see §§ 75-8-101 et seq.

When purchaser of security is charged with notice of adverse claims, see § 75-8-304.

Warranties with respect to securities, see § 75-8-306.

Secured transactions, see §§ 75-9-101 et seq.

Establishment of electronic terminals by banks, see § 81-5-100.

Branch banks, see §§ 81-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by a vendor against a collecting bank which was unable to obtain foreign exchange in United States dollars for the full amount of the proceeds of three shipments of electrical equipment which had been shipped to Santo Domingo and had been fully paid for by the vendee in Dominican pesos, summary judgment was properly granted to the defendant, since the liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located (Uniform Commercial Code, § 4-102) and defendant's ability to remit the funds had been restricted by Dominican law; moreover, defendant, as a collecting bank, neither breached its agreement with plaintiff nor failed to exercise ordinary care (Uniform Commercial Code, § 4-202) by collecting the sight drafts in Dominican pesos, since prior conduct of the parties indicated that the instructions on the sight drafts which stated that collections were to be made in United States dollars were to be construed to mean only that the

ultimate remittance was to be in dollars. *Douglaston Elec. Sales, Inc. v. Royal Bank of Canada*, 69 A.D.2d 565 (2d Dep't 1979).

Under UCC § 4-102(2), Pennsylvania law applied to determine whether deposits held by Pennsylvania bank were owned by Pakistani bank or had been effectively expropriated for benefit of Bangladesh bank by virtue of nationalization order. *Rupali Bank v. Provident Nat'l Bank*, 403 F. Supp. 1285 (E.D. Pa. 1975) (applying Pennsylvania law).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depositary bank where collecting bank gave depositary bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC

§ 4-102(1), prevailed over conflicting provisions of UCC § 3-508. *Valley Bank & Trust Co. v. First Sec. Bank*, 538 P.2d 298 (Utah 1975).

Article 4 applies only to bank's dealing with negotiable and non-negotiable documents, and Code provision to effect that no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit measure of damages for such lack or failure did not invalidate exculpatory language of contractual agreement relating to customers' use of bank's night depository facilities. *Valley Nat'l Bank v. Tang*, 18 Ariz. App. 40, 499 P.2d 991 (1972).

Article 4 establishes a comprehensive scheme for simplifying and expediting bank collections; its provisions govern the more general rules wherever inconsistent. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d

335 (Me. 1999) (applying Massachusetts law).

Article IV governs checks and other negotiable instruments during bank collection and payment and also the relationship between a bank and its checking account depositor, but Article IV does not contain detailed provisions concerning negotiable instruments, and it depends heavily on Article III to supplement its provisions in this regard. Article III governs the rights and duties of the parties to commercial paper and in case of conflict with Article IV, the rules of Article IV control those of Article III. *Leaderbrand v. Central State Bank*, 202 Kan. 450, 450 P.2d 1 (1969).

Under Negotiable Instruments Law § 350-c there is no provision which protects the drawer, and there is nothing in Art 4 of the Uniform Commercial Code which alters this conclusion. *Low v. Merchants Nat'l Bank & Trust Co.*, 24 A.D.2d 322 (3d Dep't 1966).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 526, 630-633 et seq. (applying Pennsylvania law).

16 Am. Jur. 2d, Conflict of Laws §§ 1 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank

Deposits and Collections, Form 4:3 (Instruction to jury; law governing liability of bank; location of bank or of branch).

CJS. 9 C.J.S., Banks and Banking §§ 45, 46, 382 et seq.

§ 75-4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operating circulars, clearinghouse rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or non-action approved by this chapter or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this chapter, is prima facie the exercise of ordinary care.

(d) The specification or approval of certain procedures by this chapter is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

SOURCES: Codes, 1942, § 41A:4-103; Laws, 1966, ch. 316, § 4-103; Laws, 1992, ch. 420, § 74, eff from and after January 1, 1993.

Cross References — Agreements varying effect of provisions of code, see § 75-1-102.

“Agreement”, see § 75-1-201(3).

Obligation of good faith in performance or enforcement of contract or duty within code, see § 75-1-203.

“Clearinghouse”, see § 75-4-104(1)(d).

Respects in which collecting banks must use ordinary care, see § 75-4-202.

JUDICIAL DECISIONS

1. In general; causation requirement.
2. Permissible variations.
3. Clearinghouse, federal rules.
4. Improper variations.
5. Effect of improper variation.
6. Measure of damages.
7. Practice and procedure.

1. In general; causation requirement.

Endorser of forged check may not shift liability for dishonor of check onto collecting bank on basis of delay by collecting bank in presenting check to drawee bank. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(8) limits recovery against collecting banks for conversion only if they acted in good faith and followed “reasonable commercial standards.” Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid “in good faith and in accordance with the reasonable commercial standards of the

drawee’s or payor’s business.” A bank is prohibited from disclaiming “responsibility for its own lack of good faith or failure to exercise ordinary care” under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank’s lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrong doing, back to the bank under § 4-406(3). *Bank of S. Md. v. Robertson’s Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Even assuming collecting bank did not use ordinary care in holding sight drafts for collection beyond its midnight deadline and in failing to return unpaid drafts immediately to drawer, its conduct was not shown to be cause of drawer’s loss of balance due upon unpaid invoices covered by drafts where evidence showed that drawer would have continued to make each shipment to drawee whether or not bank had returned each draft seasonably and, thus, it was drawer’s extension of credit to drawee and drawee’s financial condition that caused drawer’s losses, not any negligence, dereliction or other conduct on bank’s part. *Wilhelm Foods, Inc. v. National Bank of N. Am.*, 388 F. Supp. 1376 (S.D.N.Y. 1974) (applying New York law).

2. Permissible variations.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-1023; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

In action by payee of check against payor bank, where (1) payee on October 21, 1976 deposited check in its account with collecting bank, (2) collecting bank forwarded check to defendant, which received it on Friday, October 22, 1976 and returned it for insufficient funds on Monday, October 25, 1976, (3) defendant on November 4, 1976 instructed payee to redeposit check, (4) on such redeposit defendant, after receiving check, held it until November 16, 1976, and then returned it again for insufficient funds, (5) in intervening period, drawer of check had made assignment for benefit of creditors, and payee received no payment on instrument, (6) payee sued to recover amount of check under UCC § 4-302(a), dealing with late return of items, and alleged that defendant had prevented it from taking other means to protect itself, and (7) defendant claimed that when payee's bank forwarded once-dishonored check with covering letter that instructed defendant to remit its cashier's check when item was paid, defendant was thus directed to hold check as long as practicable without regard to defendant's midnight deadline, court held that agreement between two banks, based upon customs and practices of banking community, whereby payor bank, upon instruction of depository bank, holds possibly worthless check until sufficient funds are deposited to cover same, constituted agreement made pursuant to UCC § 4-103(1) which reasonably set aside payor bank's midnight deadline, thus relieving said bank of liability under UCC § 4-302(a). *David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

UCC § 4-103(1) essentially allows the parties to vary any of the provisions of Article 4 of the Uniform Commercial Code. *Rapp v. Dime Sav. Bank*, 64 A.D.2d

964 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Where (1) plaintiff corporation sent defendant bank executed form and corporate resolution listing plaintiff's accountant as authorized signer of checks against plaintiff's account, (2) plaintiff directed that bank statements and inquiries about account should be sent to accountant, (3) non-UCC banking law provided that notwithstanding UCC § 3-304 (dealing with purchaser's notice of claim to or defense against instrument), drawing of check by corporate agent against corporate account—either in corporation's name or in agent's name to himself as payee—and cashing of check or depositing it in agent's personal account should not constitute notice to bank of defense against or claim to check, provided that bank had on file corporation's authorization showing that agent was authorized to draw checks for limited or unlimited amount and that amount of check cashed or deposited did not exceed such amount, and (4) plaintiff's account between 1968 and 1972 signed many checks against corporation's accountant and thus converted large sums of money to his own use, court held in action to recover such sums on theory of negligence that clause in UCC § 4-103(1), providing that no agreement can disclaim bank's responsibility for its failure to exercise ordinary care, was not controlling since plaintiff, as permitted by UCC § 4-103(1), had agreed to standard by which defendant's responsibility as to checks drawn against plaintiff's account was to be measured when plaintiff filed signed authorization with bank concerning accountant's authority to draw checks, and checks drawn by accountant had not exceeded maximum limitation contained in such authorization. *Allen A. Funt Prods., Inc. v. Chemical Bank*, 63 A.D.2d 629 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 741, 417 N.Y.S.2d 254, 390 N.E.2d 1178 (1979).

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within

meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). *Rapp v. Dime Sav. Bank*, 64 A.D.2d 964 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Agreement between bank and its depositor which did not absolve bank for its negligence or lack of good faith or ordinary care, but provided condition precedent to liability in nature of abbreviated period of limitations, was not prohibited by UCC. *New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.*, 41 A.D.2d 912 (1st Dep't 1973).

Article 4 applies only to bank's dealing with negotiable and non-negotiable documents, and Code provision to effect that no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit measure of damages for such lack or failure did not invalidate exculpatory language of contractual agreement relating to customers' use of bank's night depository facilities. *Valley Nat'l Bank v. Tang*, 18 Ariz. App. 40, 499 P.2d 991 (1972).

3. Clearinghouse, federal rules.

In action by depositor against New York bank which transferred depositor's funds to second New York bank for account of German bank which had been ordered closed shortly before transfer, defendant was not negligent in failing to invoke rights under Committee on International Banking Rule on Adjustment of Payments Made in Error, since rule only applies to errors of clerical nature. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 464 F. Supp. 989 (S.D.N.Y. 1979), *aff'd*, 609 F.2d 1047 (2d Cir. N.Y. 1979).

In action by depositor against New York bank which transferred depositor's funds to second New York bank for account of German bank which had been ordered closed shortly before transfer, defendant was not negligent in failing to invoke rights under Rules 8 and 9 of Clearing House Interbank Payment System; Rule 8 had no application where both transferor

and transferee banks were Clearing House members, and Rule 9 did not apply because there was no error in computer system itself. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 464 F. Supp. 989 (S.D.N.Y. 1979), *aff'd*, 609 F.2d 1047 (2d Cir. N.Y. 1979).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depository-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged.

Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. *Community Bank v. Federal Reserve Bank*, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

A clearing house agreement may modify the effect of the Code. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

4. Improper variations.

Bank breached common-law duty to act with reasonable care when it permitted one coexecutor to withdraw funds from estate account without other coexecutor's signature in violation of both established custom and practice of banking industry and bank's own operations manual and established operating procedure. *Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 582 P.2d 109, 7 A.L.R.4th 642 (1978) (not-

ing that under California UCC § 4-103(3), "action or nonaction" by a bank "consistent ...with a general banking usage not disapproved by" Article 4 "prima facie constitutes the exercise of ordinary care," and stating, conversely, that failure of a bank to act in accordance with accepted banking practice suggests absence of due care).

Bank's conduct in blindly treating commercial paper made payable to its order as bearer paper, for sole reason that both drawer and bearer were known to bank, was manifestly unreasonable and bank could not establish reasonableness of its conduct on any theory of implied contract in light of UCC § 1-102(3) and § 4-103(1), which prevent banks from contracting away their obligation to use ordinary care in handling depositors' funds. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Since provision in customer's contract with bank which provided for waiver of any requirement of protest was subject to UCC § 4-103(1), which provides that bank cannot by agreement disclaim responsibility for its failure to exercise ordinary care, customer's waiver of protest with respect to taking up subsequently dishonored check that she had deposited in her account would not be upheld where sustaining such waiver would constitute indorsement of bank's failure to exercise ordinary care in sending customer notice of check's dishonor. *Manufacturers Hanover Trust Co. v. Akpan*, 91 Misc. 2d 622 (1977).

Clause in night depository agreement between bank and customer, providing that "the use of the night depository facilities shall be at the sole risk of the customer" was contrary to public policy and invalid. *Hy-Grade Oil Co. v. New Jersey Bank*, 138 N.J. Super. 112, 350 A.2d 279 (App. Div. 1975), certification denied, 70 N.J. 518, 361 A.2d 532 (1976).

Bank could not contractually exculpate itself from consequences of its own negligence or lack of good faith in performance of any of its banking functions; thus, provision in night depository agreement purporting to absolve bank from all liability in connection with use of night depository facility, so that its customers were required to use such facility at their sole

risk, was invalid. *Phillips Home Furnishings, Inc. v. Continental Bank*, 231 Pa. Super. 174, 331 A.2d 840 (1974), rev'd on other grounds, 467 Pa. 43, 354 A.2d 542 (1976).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. *Sun River Cattle Co. v. Miners Bank*, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

A bank cannot require its depositor to furnish an indemnity agreement as a condition to honoring its stop payment order. *Central Nat'l Bank v. Gallagher*, 13 Ohio App. 2d 115, 234 N.E.2d 524 (1968) (dictum).

5. Effect of improper variation.

A bank depositor who executed a "Request to Stop Payment of Check," containing a provision releasing the bank from liability in paying the check through "inadvertence, accident or oversight," could nevertheless recover the amount of the check from the bank because the agreement released the bank from liability for its negligence and was therefore void as against public policy, referring to §§ 4-103(1) and 4-407 of the Uniform Commer-

cial Code. *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954).

6. Measure of damages.

Under UCC § 4-103(5), when a bank handles an item carelessly, it is liable for damages caused by its negligence in the amount of the item, as reduced by the amount thereof that could not have been collected in any event. *Marcoux v. Van Wyk*, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law; holding that where bank on buyer's instructions held unpaid, beyond its midnight deadline, drafts given sellers in payment for cattle, bank's negligence caused no damage because sellers could not have collected on drafts in any event).

Where (1) bank accepted checks made payable to plaintiff, which bore plaintiff's restrictive indorsement "for deposit only," and deposited them into individual account of plaintiff's employee over period of 13 months, (2) plaintiff failed to discover such diversion of funds during such 13-month period, and (3) trial court found that bank had been negligent in so accepting and depositing such checks, and that there was no evidence that plaintiff had had any contact of any kind with bank that would have induced it to handle checks in such manner, court held (1) that since plaintiff had committed no act to cause bank to accept the restrictively indorsed checks and deposit them into wrong account, plaintiff had not been guilty of negligence that proximately caused bank to handle checks in such manner, and (2) that as a result, UCC § 4-103(5), which provides that measure of damages for a bank's failure to exercise ordinary care in handling item is amount of item reduced by amount that could not have been realized by use of ordinary care, did not apply to case. *O.K. Moving & Storage Co. v. Eglin Nat'l Bank*, 363 So. 2d 160 (Fla. App. 1978) (reversing trial court's judgment and directing entry of judgment in favor of plaintiff for total amount of checks in suit).

When payor bank fails to return check by bank's midnight deadline, it is liable for face amount of check under UCC § 4-302, and its liability is not governed by UCC § 4-103(5), which provides that gen-

eral measure of damages for failure to exercise ordinary care in handling an item is the amount of the item, less any amount which could not have been realized even by the exercise of ordinary care. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977) (stating that there is a rational basis for imposing liability on payor banks that differs from the liability imposed on collecting banks, that payor bank is only bank in the collection process that is in a position to know the actual state of the drawer's account, and that it is also the only bank in the collection process that can actually pay the check).

UCC § 4-103(5) did not apply in action by depositor against bank for conversion of depositor's Christmas club account, which was based, not on misapplication of item in bank collection process, but on common law conversion of funds which belonged to depositor. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depository, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. *Isaacs v. Chartered New England Corp.*, 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Bank's negligence in not insisting on written instructions from depositor before cancelling unindorsed treasurer's check and transferring funds to another bank upon instructions contained in letter from person claiming to be agent for depositor rendered bank liable to depositor for amount of funds represented by check, but bank's conduct did not amount to bad faith and did not make bank liable for subsequent losses suffered by depositor in same investment dealing. *Taylor v. Equitable Trust Co.*, 269 Md. 149, 304 A.2d 838 (1973).

This section cannot serve to limit the measure of damages of a bank, which contrary to the provisions of § 4-302, holds a dishonored check beyond the time limit imposed upon it. *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

7. Practice and procedure.

Trial court erred by granting the bank summary judgment in a customer's lawsuit to recover damages for emotional distress stemming from an investigation of a fraudulent account withdrawal where the bank's intentional, material misrepresentation indicated it had not acted in good faith throughout its investigation and created a jury question with respect to damages. *Wise v. Valley Bank*, — So. 2d —, 2002 Miss. App. LEXIS 76 (Miss. Ct. App. Feb. 5, 2002).

In suit by cattle sellers against bank under UCC § 4-202(1) and (2) for bank's negligently holding, on corporate-cattle buyer's instructions, unpaid drafts given sellers in payment for their cattle beyond bank's midnight deadline, where evidence showed (1) that drafts were received by bank between September 20 and September 28, 1973, but were not returned to sellers' banks until October 3, 1973, when corporate buyer collapsed following failure of efforts to rescue it from insolvency, (2) that bank itself was declared insolvent on October 4, 1973 because of unsecured credit extensions to buyer, (3) that sellers were unsecured creditors of buyer, (4) that cattle had been sold to buyer in ordinary course of business before drafts arrived at bank, (5) that even with timely notice of nonpayment of drafts, sellers could not have recovered by stopping delivery of cattle or replevying them, and (6) that sellers as matter of law could not have recovered amount of drafts through liens on buyer's assets, since such assets were already subject to valid prior liens, district court properly held that there was sufficient evidence to show that bank had failed to use ordinary care in handling drafts. However, district court erred in denying bank's motion for judgment n. o. v. and in accepting sellers' contention that other evidence in case supported possibility that drafts were collectible, since that

possibility was exceedingly remote and under UCC § 4-103(5), governing damages for failure to exercise ordinary care in handling items, sellers to be entitled to recover damages from bank were required to show existence of reasonable chance of collecting on drafts. *Marcoux v. Van Wyk*, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

Although UCC § 4-404 protects a bank which pays a state check as long as it acted in good faith, it does not eliminate the requirement, imposed by UCC § 4-103(1), of ordinary care that a bank must observe in all its dealings. Thus, when a bank's actions are put in issue, it must show that it exercised the requisite degree of care with regard to its customer. *Charles Ragusa & Son v. Community State Bank*, 360 So. 2d 231 (La. App. 1978) (holding, where defendant bank paid check more than three years after it had been issued, lost, and customer had placed stop order thereon, that bank had not exercised requisite degree of care toward its customer, and that under UCC § 4-103(5), customer was properly awarded face amount of such check).

In action against collecting bank by cattle dealers who had drawn sight drafts on cattle buyer through collecting bank for purchase price of cattle delivered to buyer, alleging that collecting bank was negligent in failing to return unpaid sight drafts before its midnight deadline, evidence was sufficient to establish that sight drafts were collectable and, thus, that cattle dealers were damaged by collecting bank's negligence, notwithstanding buyer corporation was insolvent at time drafts were presented for collection, where, inter alia, buyer corporation continued to operate as going concern and to pay its debt for approximately two weeks thereafter. *Marcoux v. Mid-States Livestock, Inc.*, 429 F. Supp. 155 (N.D. Iowa 1977), aff'd, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978).

Where question of validity of provision in night depository agreement purporting to absolve bank from all liability in connection with use of depository facility was not presented to Superior Court in appeal

of summary judgment in favor of bank, Superior Court exceeded bounds of proper appellate review in concluding that such provision was invalid. *Phillips Home Furnishings, Inc. v. Continental Bank*, 467 Pa. 43, 354 A.2d 542 (1976).

Although written notice of termination of authority to execute instruments would be desirable and even though checking account agreement between corporation and bank required revocation of signatory authority to be in form of written corporate resolution, controverted question of fact as to whether bank received oral notice of withdrawal of signatory authorization presented material issue of fact which would ordinarily preclude summary judgment, since, under UCC § 4-103, no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care, and since, under UCC § 1-103, general rule of principal and agent that notice of termination of agent's authority can be given orally was applicable in absence of specific UCC provision on point. *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

In a corporation's suit against a bank for recovery of amount of check which the bank received for account of the corporation which had previously closed out its account, the court held that the bank had failed to meet its statutory obligation to use ordinary care when, contrary to the unqualified written instructions of the plaintiff, it (1) seized and deposited the checks under closed account of plaintiff and (2) having deposited the checks, failed to remit all balances to the plaintiff's account in North Carolina, as instructed. The court also said that the argument could be made that under § 4-201 of the UCC, at the closing of the account, the bank no longer remained an agent of the plaintiff and for that reason alone had no authority to accept, deposit or disburse checks payable to the plaintiff. *General Apparel Sales Corp. v. Chase Manhattan Bank*, 321 F. Supp. 891 (S.D.N.Y. 1970).

An extension of the time for returning an item by clearing house agreement is proper since with the greater volume of

checks handled by computers it is proper to recognize the necessity of providing additional time in which to make the determination to pay or not to pay after

the computer phase of the banking operation has been completed. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Effect on bank depositor's rights and those of bank, or printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Am Jur. 11 Am. Jur. 2d, Banks §§ 940, 970-998.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:31 et seq. (variation by agreement).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:41, 4:42(General provisions and definitions; damages).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:31-4:35 (General provisions and definitions; variation by agreement).

17 Am. Jur. Proof of Facts 3d 541, Banking Negligence — Improper dishonor of Letter of Credit.

CJS. 9 C.J.S., Banks and Banking §§ 408-411, 414, 648.

§ 75-4-104. Definitions and index of definitions.

(a) In this chapter, unless the context otherwise requires:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;

(2) "Afternoon" means the period of a day between noon and midnight;

(3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions;

(4) "Clearinghouse" means an association of banks or other payors regularly clearing items;

(5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (Section 75-8-102) or instructions for uncertificated securities (Section 75-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

(7) "Draft" means a draft as defined in Section 75-3-104 or an item, other than an instrument, that is an order;

(8) "Drawee" means a person ordered in a draft to make payment;

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Chapter 4A or a credit or debit card slip;

(10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

(11) “Settle” means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final;

(12) “Suspends payments” with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Agreement for electronic presentment”	Section 75-4-110
“Bank”	Section 75-4-105
“Collecting bank”	Section 75-4-105
“Depository bank”	Section 75-4-105
“Intermediary bank”	Section 75-4-105
“Payor bank”	Section 75-4-105
“Presenting bank”	Section 75-4-105
“Presentment notice”	Section 75-4-110

(c) The following definitions in other chapters apply to this chapter:

“Acceptance”	Section 75-3-409
“Alteration”	Section 75-3-407
“Cashier’s check”	Section 75-3-104
“Certificate of deposit”	Section 75-3-104
“Certified check”	Section 75-3-409
“Check”	Section 75-3-104
“Good faith”	Section 75-3-103
“Holder in due course”	Section 75-3-302
“Instrument”	Section 75-3-104
“Notice of dishonor”	Section 75-3-503
“Order”	Section 75-3-103
“Ordinary care”	Section 75-3-103
“Person entitled to enforce”	Section 75-3-301
“Presentment”	Section 75-3-501
“Promise”	Section 75-3-103
“Prove”	Section 75-3-103
“Teller’s check”	Section 75-3-104
“Unauthorized signature”	Section 75-3-403

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:4-104; Laws, 1966, ch. 316, § 4-104; Laws, 1992, ch. 420, § 75; Laws, 1996, ch. 468, § 55, eff from and after July 1, 1996.

Editor’s Note — Laws, 1996, ch. 468, § 72, provides as follows:

“SECTION 72. (a) This act does not affect an action or proceeding commenced before this act takes effect.

“(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a

security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect."

Cross References — Application of certain definitions of this section to UCC provisions on funds transfers, see § 75-4A-104.

Certifying checks, see § 81-5-71.

Clearinghouses, see §§ 81-5-93, 81-5-95.

JUDICIAL DECISIONS

1. In general; acceptance.
2. Account.
3. Certificate of deposit.
4. Check.
5. Customer.
6. Draft.
7. Item.
8. Midnight deadline.
9. Notice of dishonor.
10. Properly payable.
11. Protest.
12. Secondary party.

1. In general; acceptance.

Where a bank places on the item deposited by its customer a statement indicating that it has been credited to its customer's account, such statement has the effect of an indorsement by the customer but does not make the bank subject in any way dispute between the drawer of the check and the payee. *Cole v. First Nat'l Bank*, 433 P.2d 837 (Wyo. 1967).

2. Account.

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126,

38 L. Ed. 2d 57 (1973) (applying Georgia law).

3. Certificate of deposit.

Certificate of deposit, which contained unconditional promise to pay certain sum of money absolutely, had all essential elements of promissory note and should be governed by same rules as promissory note with reference to creation of joint-tenancy rights therein. *In re Estate of Baxter*, 56 Ill. 2d 223, 306 N.E.2d 304 (1973).

4. Check.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

5. Customer.

In action against bank for alleged negligence in depositing and disbursing proceeds from sale of two federal timber contracts and enabling proceeds, which belonged to plaintiff, to be converted by plaintiff's former officer and such officer's confederate, where evidence showed that after his resignation, plaintiff's former officer was authorized by plaintiff to negotiate for sale of one, but not both, of such timber contracts; that such officer, in conjunction with his confederate, sold both contracts and instructed purchaser to pay cash advance to confederate's Seattle bank; that such advance was first trans-

ferred by wire to San Francisco branch of confederate's bank and then transferred by wire to account of confederate in confederate's Seattle bank; and that plaintiff's former officer and his confederate thereafter withdrew and converted most of such funds to their own use, summary judgment in favor of defendant bank, on ground that it owed no duty to plaintiff, would be affirmed because (1) plaintiff was not customer of defendant under UCC § 4-104(1)(e), (2) defendant had not agreed to collect purchaser's cash-advance checks for plaintiff, and (3) plaintiff was also not payee or indorser of such checks. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. *Bank Leumi Trust Co. v. Marine Midland Bank*, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and

3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

Under UCC § 4-104(1)(e), president of corporation was not "customer" of bank with respect to corporation's checking account, notwithstanding he opened corporate account, determined who would draw on it and also had personal account with bank, and thus he did not have cause of action against bank under UCC § 4-402 for wrongful dishonor of checks drawn on corporate account. *Farmers Bank v. Sinwellan Corp.*, 367 A.2d 180 (Del. 1976).

Partner who deposited check bearing forged indorsement into partnership account was liable for amount of check under warranty of title contained in UCC § 4-207(2) where partnership was customer of bank within meaning of UCC § 4-104, check was credited to partnership, and partner was liable under state law for partnership debts. *Kelton Motors, Inc. v. Phoenix of Hartford Ins. Cos.*, 522 F.2d 728 (2d Cir. Vt. 1975) (applying Vermont law).

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

As a customer of a bank, a partnership can enter into the contractual relationship of debtor and creditor. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

Since a bank carrying an account with another bank is a "customer" within the

definition of that term in subd 1(e) of this section, it may stop payment on a check drawn by it on such other bank under the procedure prescribed in UCC § 4-403. *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705 (1965).

6. Draft.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

7. Item.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) \$_____", and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee—and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. *Horney v. Covington County Bank*, 716

F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

8. Midnight deadline.

Where customer with checking accounts at both plaintiff and defendant banks began kiting checks between such accounts and defendant, on discovering such practice, thereafter refused to honor checks drawn by customer on account with defendant, which were deposited in customer's account with plaintiff and then presented by plaintiff to defendant for payment; and where defendant continued to accept deposits by customer in account with defendant of checks drawn on customer's account with plaintiff, which checks were paid by plaintiff, in conversion action in which plaintiff sought return of funds thus accumulated in customer's account with defendant and alleged that defendant intended to apply such funds to extinguish customer's debts to defendant that would become due in future, (1) in absence of fiduciary relationship or other legal duty, defendant was not obligated to inform plaintiff that customer was kiting checks; (2) defendant had right to continue to accept for deposit checks drawn by customer on account with plaintiff, to present such checks to plaintiff for payment, and to refuse to honor checks drawn by customer on account with defendant that were deposited in account with plaintiff; (3) plaintiff was required to pay checks drawn by customer on account with it or to return such checks by midnight deadline provided by UCC § 4-104(1)(h); (4) when plaintiff paid such

checks, it no longer owned funds represented thereby, and defendant thus did not convert any funds belonging to plaintiff; (5) only the customer, and not plaintiff, could complain about defendant's refusal to honor checks drawn by customer on account with defendant or defendant's applying funds accumulated in customer's account to extinguish customer's debts to defendant; and (6) defendant breached no warranty owed to plaintiff under UCC § 4-207 because all that defendant warranted, as holder of checks presented to plaintiff for payment, was that defendant had good title to such checks and that it had no knowledge that drawer's signature was unauthorized. *Citizens Nat'l Bank v. First Nat'l Bank*, 347 So. 2d 964 (Miss. 1977).

Where accommodation indorser, on May 1, 1970, indorsed check drawn on out-of-state bank which was made payable to drawer; where cashing bank cashed check for payee drawer and initiated collection on check through another bank on same day; where almost 90 days later, on July 28, 1970, collection bank notified cashing bank that check had been dishonored with notice stating "original lost in transit-account closed"; where on July 29, 1970, cashing bank debited accommodation indorser's account for amount of check and notified her in writing of payor bank's dishonor of check; and where record did not disclose which of several banks involved in collection process had lost check or delayed taking action with regard to it, (1) accommodation indorser's liability was discharged under UCC § 3-502(1)(a) because notice of check's dishonor was unreasonably delayed by failure of unknown bank in collection process to observe its midnight deadline under UCC § 4-104(h) for giving such notice, and (2) cashing bank could look for recovery from such unknown bank which had committed violation of law involved. *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank

was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. *Goodman v. Norman Bank of Commerce*, 551 P.2d 661 (Okla. Ct. App. 1976).

Where payment of checks was refused for insufficient funds and defendant bank returned checks by mail through channels and wired notice of non-payment to Federal Reserve Office on day after checks were received, items were protested prior to midnight deadline as defined in Code § 4-104(1)(h). *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973) (applying Missouri law).

In an action by the payee on demand instruments returned unpaid by the payor bank, where automobile title documents accompanying the draft signed by the maker were expressly delivered against payment, the items were documentary drafts and thus exempt from the midnight deadline. *Wiley v. Peoples Bank & Trust Co.*, 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

9. Notice of dishonor.

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depository bank where collecting bank gave depository bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. *Valley Bank & Trust Co. v. First Sec. Bank*, 538 P.2d 298 (Utah 1975).

Payor bank was not liable to collecting bank for conversion of checks which were returned unpaid to collecting bank, notwithstanding checks were marked "Uncollected funds" rather than "Insufficient Funds" while there were sufficient funds

on deposit in customer's account to pay part of checks, where officer of payor bank talked with officer collecting bank and informed him of payor bank's intention to dishonor checks and make offset against customer's account for obligations due to payor bank, since collecting bank had ample time thereafter to inquire into specifics of dishonor; payor bank gave proper notice under UCC § 3-508(3) and its action of dishonoring checks was legal and timely under clearinghouse rule. *Security Trust Co. v. First Nat'l Bank*, 79 Misc. 2d 523 (1974).

10. Properly payable.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

11. Protest.

Where payment of checks was refused for insufficient funds and defendant bank returned checks by mail through channels and wired notice of non-payment to Federal Reserve Office on day after checks were received, items were protested prior to midnight deadline as defined in Code § 4-104(1)(h). *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973) (applying Missouri law).

12. Secondary party.

In action against bank for alleged negligence in depositing and disbursing pro-

ceeds from sale of two federal timber contracts and enabling proceeds, which belonged to plaintiff, to be converted by plaintiff's former officer and such officer's confederate, where evidence showed that after his resignation, plaintiff's former officer was authorized by plaintiff to negotiate for sale of one, but not both, of such timber contracts; that such officer, in conjunction with his confederate, sold both contracts and instructed purchaser to pay cash advance to confederate's Seattle bank; that such advance was first transferred by wire to San Francisco branch of confederate's bank and then transferred by wire to account of confederate in confederate's Seattle bank; and that plaintiff's former officer and his confederate thereafter withdrew and converted most of such funds to their own use, summary judgment in favor of defendant bank, on ground that it owed no duty to plaintiff, would be affirmed because (1) plaintiff was not customer of defendant under UCC § 4-104(1)(e), (2) defendant had not agreed to collect purchaser's cash-advance checks for plaintiff, and (3) plaintiff was also not payee or indorser of such checks. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Cosignatory on joint checking account was not liable for overdraft beyond balance of joint account where cosignatory neither participated in transaction creating overdraft nor received funds as result of it. *Cambridge Trust Co. v. Carney*, 115 N.H. 94, 333 A.2d 442 (1975).

RESEARCH REFERENCES

ALR. Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 A.L.R.3d 714.

Banks: what is "documentary draft" under UCC Sec. 4-104(1)(f). 65 A.L.R.4th 1095.

Am Jur. 10 Am. Jur. 2d, Banks §§ 1-2.

11 Am. Jur. 2d, Banks §§ 970, 978 et seq.

11 Am. Jur. 2d, Bills and Notes §§ 323, 351-372.

50 Am. Jur. 2d, Letters of Credit § 3.

73 Am. Jur. 2d, Statutes §§ 223 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:4-4:15 (General provisions and definitions).

CJS. 9 C.J.S., Banks and Banking §§ 2, 647, 650, 671.

82 C.J.S., Statutes § 207.

§ 75-4-105. “Bank”; “depository bank”; “payor bank”; “intermediary bank”; “collecting bank”; “presenting bank.”

In this chapter:

(1) “Bank” means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company;

(2) “Depository bank” means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter;

(3) “Payor bank” means a bank that is the drawee of a draft;

(4) “Intermediary bank” means a bank to which an item is transferred in course of collection except the depository or payor bank;

(5) “Collecting bank” means a bank handling an item for collection except the payor bank;

(6) “Presenting bank” means a bank presenting an item except a payor bank.

SOURCES: Codes, 1942, § 41A:4-105; Laws, 1966, ch. 316, § 4-105; Laws, 1992, ch. 420, § 76, eff from and after January 1, 1993.

Cross References — Commercial paper, see §§ 75-3-101 et seq.

JUDICIAL DECISIONS

1. In general.

Where buyer of cattle paid for them with defendant bank’s “customer draft” which (1) stated in main body of instrument “upon acceptance, pay to order of (plaintiff seller) \$_____,” and (2) stated in lower left corner of instrument, “To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi,” court held (1) that such draft was “demand item” under UCC § 4-302(a), which deals with liability for late return of “demand item” since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of “item” in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be “demand item,” (3) that draft’s “order to pay” was not affected by words, “on acceptance,” (4) that defendant bank was draft’s drawee—and thus was “payor bank” under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant’s customer (seller-drawer) prepared and signed draft, (5) that UCC

§ 3-121, which deals with instruments payable “at bank,” was inapplicable because draft in suit did not contain words “payable at,” (6) that draft’s payee (plaintiff seller) did not waive defendant’s compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as “payor bank” under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant’s midnight deadline. *Horney v. Covington County Bank*, 716 F.2d 335 (5th Cir. 1983), reh’g denied, 725 F.2d 1006 (5th Cir. 1984).

Drawee bank is clearly “payor” bank under UCC § 4-105(b). *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller’s account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3,

1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Bank which was both first bank to which payee's checks were transferred and also bank that was liable for payment of such checks as drawn was both depository bank and payor bank under UCC § 4-105(a) and (b). *Bartlett v. Bank of Carroll*, 218 Va. 240, 237 S.E.2d 115 (1977).

Bank was not "payor bank," as defined in UCC § 4-105(b), with respect to sight drafts which were drawn on buyer of meat and which were sent to bank by seller accompanied by invoices for meat, although drafts stated they were payable at bank, where there were no funds of buyer

specifically deposited to seller's credit out of which seller had right to direct bank to make payment. *Whitehall Packing Co. v. First Nat'l City Bank*, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Bank that cashed forged checks was not "collecting bank" within meaning of UCC § 4-105(d) where person who cashed checks was not "customer" of bank, in that she had no account at bank, and where bank did not take checks for collection but rather purchased them, paying cash for them, and sought to collect on them for its own account. *Board of Higher Educ. v. Bankers Trust Co.*, 86 Misc. 2d 560 (1976).

Bank was acting as both depository and collecting bank under UCC § 4-105 so as to have right under UCC § 4-212 to charge payees' account or obtain refund for money advanced on basis of treasury bills, where treasury bills were dishonored after payees were allowed to overdraw their account by amount to be received for bills discounted and sold through normal market channels. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. *Berman v. United States Nat'l Bank*, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's pay-

ees was forged. *Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co.*, 514 S.W.2d 860 (Mo. Ct. App. 1974).

A bank was acting merely as a collecting bank and not as a payor bank where it transmitted from the stockbroker to the stockbroker's customer the draft covering

the purchase price of the stock but these were returned by the bank to the customer because unable to pay for them. *Phelan v. University Nat'l Bank*, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

RESEARCH REFERENCES

ALR. Construction of UCC § 4-105, which defines "payor bank," "collecting bank," and the like. 84 A.L.R.3d 1073.

Am Jur. 11 Am. Jur. 2d, Banks §§ 972, 986-988,

15A Am. Jur. 2d, Commercial Code §§ 68, 70, 71.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:11, 4:12 (General provisions and definitions).

CJS. 9 C.J.S., Banks and Banking §§ 2, 647, 650, 671.

§ 75-4-106. Payable through or payable at bank; collecting bank.

(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is "payable at" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.

SOURCES: Laws, 1992, ch. 420, § 77, eff from and after January 1, 1993.

Editor's Note — Provisions formerly found in § 75-4-106 can now be found in § 75-4-107.

§ 75-4-107. Separate office of bank.

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders must be given under this chapter and under Chapter 3.

SOURCES: Formerly § 75-4-106: Codes, 1942, § 41A:4-106; Laws, 1966, ch. 316, § 4-106; Laws, 1992, ch. 420, § 78, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-106. Provisions formerly found in § 75-4-107 can now be found in § 75-4-108.

Cross References — Notice, knowledge or notification received by organization, effectiveness generally, see § 75-1-201(27).

Commercial paper, see §§ 75-3-101 et seq.

Who is holder in due course, see § 75-3-302.

Presentment, how made, see §§ 75-3-504, 75-4-212.

Liability for action or nonaction by or at branch or separate office of bank, law governing, see § 75-4-102.

Holder in due course, when bank gives value for purpose of determining status as, see § 75-4-211.

Regulation of branch banks, generally, see §§ 81-7-1 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-106.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-106.

6. In general.

The application of UCC § 4-106 is not mandatory. The Official Comments indicate that a branch or separate office of a bank may be treated as a separate bank for certain purposes while maintaining the bank's single legal entity for other purposes. The comments also correctly note that as a practical matter, many branches function as separate banks in the handling and payment of certain items and require time for doing so. This is especially true in states where branch banking is permitted throughout the state. The Official Comments specifically suggest that where Article 4 imposes time limits, such as those for notice of dishonor, a branch that functions as a separate bank should be entitled to the time limits that are available to a separate bank. *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979) (stating that under North Carolina UCC § 4-106, a bank is no longer required to maintain its own deposit ledgers before being entitled to separate bank treatment, and that the legislature's intent was to aid branch banks in attaining separate bank status).

In action by bank against customer to recover overdraft created when bank charged back amount of dishonored check

to customer's account, where (1) check in suit, which was drawn by corporation on its account with plaintiff's Wilmington branch and made payable to defendant, was presented by defendant on Friday, March 18, 1977, at Wilmington branch, after its cutoff hour, for deposit in defendant's account with plaintiff's High Point branch, thereby making check legally presented on Monday, March 21, 1977, (2) check was processed at plaintiff's eastern operations center on March 21, 1977, and processing included wiring deposit to plaintiff's western operations center for provisional credit to defendant's account with High Point branch and debiting of drawer's account at eastern operations center for amount of check, (3) on March 22, 1977, plaintiff's "Transactions not Posted Report" listed check as nonposted because of insufficient funds, and it was returned on same day to plaintiff's western operations center for charge-back to defendant's account, (4) on March 23, 1977, western operations center received check, charged it back to defendant's account, and mailed it, along with notice of its dishonor, to defendant, and (5) defendant in the meantime had written check on his account, with result that charge-back created overdraft as to which defendant refused to reimburse plaintiff, court held (1) that under UCC § 4-106, dealing with treatment of branch bank as separate bank for purpose of computing time within which, and place at which, action may be taken or notices given under the code, both High Point and Wilmington branches of plaintiff bank were entitled to separate bank status, (2) that since Wilmington branch was payor bank in the transaction, before it could revoke any provisional settlement, it had to comply with UCC § 4-301(4)(b), which provides

that an item is "returned" when it is sent or delivered to the bank's transferor, (3) that since defendant had presented check for deposit in his High Point account, that branch was both collecting bank and transferor of check for collection and thus entitled to its return or notice of its dishonor, (4) that payor bank (Wilmington branch) had preserved its right to revoke provisional settlement for check by returning it to collecting bank (High Point branch) before payor bank had made final payment and before its midnight deadline, as required by UCC § 4-301(1)(a), and (5) that since collecting bank (High Point branch), which had given defendant provisional settlement for check, received returned check for charge-back on March 23, 1977, and mailed both check and notice of its dishonor to defendant on same day, it acted well within its midnight deadline under UCC § 4-212(1) and, having received no final settlement on check, was entitled to charge it back against defendant's account to cover overdraft. *North Carolina Nat'l Bank v. Harwell*, 38 N.C.App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

The effect of UCC § 4-106 is to give a branch bank that is a payor bank its own midnight deadline for carrying out its duties as payor, even though it keeps no deposit ledgers or similar books. *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

In action by payee of check drawn on, and dishonored by, defendant Hailey branch of First Security Bank of Idaho, in which payee alleged that defendant had failed to return check or give notice of its dishonor before defendant's midnight deadline, where (1) payee deposited check on Friday, October 31, 1975, in its account with Twin Falls bank (not a part of First Security Bank of Idaho) and received provisional credit for such deposit, (2) Twin Falls bank, acting as payee's agent for collection, mailed check on Monday, November 3, 1975, to Boise branch of First Security Bank of Idaho for deposit in its commercial check-clearing account with Boise branch and received provisional credit for such deposit, (3) check arrived at Boise branch on Tuesday, November 4,

1975, and was sent to First Security Bank's data processing center, which was located in basement of First Security's Boise branch and performed numerous functions for both the Boise and Hailey branches, (4) on night of November 4, 1975, name of bank on which check was drawn and check's account number were sent to First Security Bank's computer at Salt Lake City, Utah, which informed data processing center at Boise branch that check's account contained insufficient funds to pay check, (5) on Wednesday, November 5, 1975, Boise branch sent check to defendant Hailey branch, (6) on Thursday, November 6, 1975, Hailey branch dishonored check, stamped "refer to maker" on it, and returned it to Boise branch with a clearings letter that effected reversal of provisional credit previously given to Boise branch and provisional debit given to defendant Hailey branch, (7) on Monday, November 10, 1975, Boise branch debited Twin Falls bank's account at Boise branch for check's amount and sent check to Twin Falls bank, (8) on Wednesday, November 12, 1975, Twin Falls bank received check and sent payee notice of dishonor on following day, and (9) payee received such notice on Friday, November 14, 1975, more than two weeks after check's deposit was made, court held (1) that trial court had erred in ruling that for purposes of UCC § 4-302(a), dealing with payor bank's liability for late return of demand item, arrival of check at First Security Bank's data processing center constituted "presentment on" and "receipt by" defendant Hailey branch of such check, so as to cause Hailey branch's midnight deadline to begin to run from time of check's arrival at data processing center, (2) that although data processing center performed some routine accounting steps for both Boise and Hailey branches, this did not destroy the essential character of the transaction, namely, that Boise branch had acted as collecting and presenting bank for item that only Hailey branch could pay, (3) that under UCC § 4-106, separate status of a branch bank is to be respected in computing its midnight deadline, even though some of the branch's duties are performed outside the branch, (4) that nothing in the

record showed that the data processing center had had any authority to receive presentment of check in suit or any means of ascertaining check's genuineness and sufficiency of drawer's funds to pay it, (5) that check's presentment on payor bank therefore occurred when check physically arrived at defendant Hailey branch with indorsements of all prior transferors, including that of the Boise branch, and not when it arrived at data processing center in the Boise branch, and (6) that as a result, defendant Hailey branch's mid-

night deadline had to be calculated from time check was physically presented to and received by it. *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

Under Code § 4-106, notice of adverse claim received by one branch of bank did not constitute constructive notice thereof to any other branch of same bank. *Gutekunst v. Continental Ins. Co.*, 486 F.2d 194 (2d Cir. N.Y. 1973) (applying New York law).

RESEARCH REFERENCES

ALR. Construction of UCC § 4-106 defining separate or branch office of bank. 5 A.L.R.4th 938.

Am Jur. 10 Am. Jur. 2d, Banks §§ 526, 630-638.

6 Am. Jur. Pl & Pr Forms (Rev), Bank

Deposits and Collections, Forms 4:51, 4:52 (General provisions and definitions; branch offices).

CJS. 9 C.J.S., Banks and Banking §§ 45, 46.

§ 75-4-108. Time of receipt of items.

(a) For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 P.M. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

SOURCES: Formerly § 75-4-107: Codes, 1942, § 41A:4-107; Laws, 1966, ch. 316, § 4-107; Laws, 1992, ch. 420, § 79, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-107. Provisions formerly found in § 75-4-108 can now be found in § 75-4-109.

Cross References — Definition of "banking day", see § 75-4-104.

Regulation of banking hours, generally, see § 81-5-97.

RESEARCH REFERENCES

ALR. Liability of bank in connection with night depositor service. 27 A.L.R.2d 530.

Am Jur. 10 Am. Jur. 2d, Banks § 734.

11 Am. Jur. 2d, Banks §§ 987, 988.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:64 (Instruction to jury; cut-off hour; time of receipt of items).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2251 et seq. (Time of receipt of items).

CJS. 9 C.J.S., Banks and Banking §§ 273, 274, 383.

§ 75-4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this code for a period not exceeding two (2) additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this code or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.

SOURCES: Formerly § 75-4-108: Codes, 1942, § 41A:4-108; Laws, 1966, ch. 316, § 4-108; Laws, 1992, ch. 420, § 80, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-108. Provisions formerly found in § 75-4-109, (Codes, 1942, § 41A:4-109; Laws, 1966, ch. 316, § 4-109), defining the process of posting, have been repealed.

Cross References — Where Code chapters 3 and 4 conflict, chapter 4 is controlling, see §§ 75-3-103, 75-4-102.

Time for presentment, see § 75-3-503.

Varying effect of Code provisions by agreement; effect of Federal Reserve regulations and operating letters, clearinghouse rules, and the like, see § 75-4-103.

"Payor bank" defined, see § 75-4-105(b).

Definition of "collecting bank," see § 75-4-105(d).

Responsibility for collection; when action seasonable, see § 75-4-202.

Right of charge-back or refund, see § 75-4-214.

When item is finally paid by payor bank, see § 75-4-215.

Recovery of payment by return of items; time of dishonor, see § 75-4-301.

Payor bank's responsibility for late return of item, see § 75-4-302.

JUDICIAL DECISIONS

1.-5. [Reserved for future use.]

6. Under former § 75-4-108: Delays.

7. Under former § 75-4-109: Process of posting.

1.-5. [Reserved for future use.]

6. Under former § 75-4-108: Delays.

Fact that payor bank did not hold check beyond its midnight deadline in order to accommodate its customer did not justify excusing bank under UCC § 4-108(2) for failure to meet midnight deadline. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Payor bank which did not dishonor and

return check for insufficient funds until after bank's midnight deadline was not excused under UCC § 4-108(2) for not meeting such deadline simply because of heavy volume of checks handled during Christmas holiday, breakdown of two of bank's checkposting machines, and absence of one bookkeeper because of illness, where such circumstances were foreseeable and thus were under bank's control, but responsible bank officers had not established any procedure for timely return of bad checks during busy holiday season (observing that defendant bank could have returned check before its midnight

deadline simply by depositing it in the mail). *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. *Sun River Cattle Co. v. Miners Bank*, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

7. Under former § 75-4-109: Process of posting.

UCC § 4-109(e) permits the reversing of an entry after a check is charged to the drawer's account only if there was an error in the posting. *H. Schultz & Sons v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977).

UCC § 4-109(e) did not justify a bank reversing an entry where the bank had proven the check and debited the drawer's account and learned the next day that the drawer had filed for bankruptcy. *H. Schultz & Sons v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977).

Where bank had made final posting of check under UCC § 4-109 and then wrongfully reversed it, bank was liable to payee. *H. Schultz & Sons v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977).

UCC § 4-109(e) does not permit payor bank, without regard to its reason or purpose, to reverse an entry at any time up to the midnight deadline. Instead, subsection (e) permits corrective action to be taken only in those cases where an error of some type has been made by the bank in completing its process of posting. Thus, where bank had completed without error its process of posting check payable to plaintiff on account maintained by drawer with bank, notice received by bank on following day of drawer's bankruptcy came too late to permit reversal of bank's entry, payment was final under final-payment rule, and bank was liable to plaintiff for face amount of check. *H. Schultz & Sons v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977).

The Code defines the process of posting in terms of the usual procedure followed by the payor bank. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

The process of posting embraces two elements: (1) the exercise of judgment to determine to make payment and (2) the mechanical element of recording the action taken by the bank. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

Until the expiration of the clearing house deadline, the payor bank may reverse the entry of payment. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

The right to reverse an entry is not limited to the correction of an entry erroneously made and the bank may therefore reverse an entry in order to comply with a stop payment order. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

In view of the omission of this section from the Ohio Commercial Code the court was obliged to look to non-code law to determine whether or not the process of posting a check drawn against a depositor's account had been completed prior to receipt by the bank of a restraining order prohibiting it from paying money from the account. *Gibbs v. Gerberich*, 1 Ohio App. 2d 93, 203 N.E.2d 851, 17 A.L.R.3d 928 (1964).

RESEARCH REFERENCES

ALR. Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment. 22 A.L.R.4th 10.

Am Jur. 11 Am. Jur. 2d, Banks §§ 972-976, 983, 990-994.

6 Am. Jur. Pl & Pr Forms (Rev), Bank

Deposits and Collections, Form 4:75 (Failure of drawee to give notice of nonpayment of check; maker bankrupt).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:61-4:63 (Time provisions).

CJS. 9 C.J.S., Banks and Banking §§ 325, 408, 409, 411, 414.

§ 75-4-110. Electronic presentment.

(a) “Agreement for electronic presentment” means an agreement, clearinghouse rule, or Federal Reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item (“presentment notice”) rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to “item” or “check” in this chapter means the presentment notice unless the context otherwise indicates.

SOURCES: Laws, 1992, ch. 420, § 81, eff from and after January 1, 1993.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 313, 316, 317.

CJS. 10 C.J.S., Bills and Notes §§ 202-209.

§ 75-4-111. Statute of limitations.

An action to enforce an obligation, duty, or right arising under this chapter must be commenced within three (3) years after the cause of action accrues.

SOURCES: Laws, 1992, ch. 420, § 82, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. When statute of limitations starts to run against depositor’s cause of action against bank to recover funds paid out on check bearing forged indorsement. 82 A.L.R.2d 933.

Computer sales and leases: time when cause of action for failure of performance accrues. 90 A.L.R.4th 298.

Am Jur. 12 Am. Jur. 2d, Bills and Notes §§ 632 et seq.

PART 2.

COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS.

SEC.

- 75-4-201. Status of collecting bank as agent and provisional status of credits; applicability of chapter; item indorsed "pay any bank."
- 75-4-202. Responsibility for collection or return; when action timely.
- 75-4-203. Effect of instructions.
- 75-4-204. Methods of sending and presenting; sending directly to payor bank.
- 75-4-205. Depositary bank holder of unindorsed item.
- 75-4-206. Transfer between banks.
- 75-4-207. Transfer warranties.
- 75-4-208. Presentment warranties.
- 75-4-209. Encoding and retention warranties.
- 75-4-210. Security interest of collecting bank in items, accompanying documents and proceeds.
- 75-4-211. When bank gives value for purposes of holder in due course.
- 75-4-212. Presentment by notice of item not payable by, through, or at bank; liability of drawer or indorser.
- 75-4-213. Medium and time of settlement by bank.
- 75-4-214. Right of charge-back or refund; liability of collecting bank; return of item.
- 75-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.
- 75-4-216. Insolvency and preference.

§ 75-4-201. Status of collecting bank as agent and provisional status of credits; applicability of chapter; item indorsed "pay any bank."

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this chapter apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder until the item has been:

- (1) Returned to the customer initiating collection; or
- (2) Specially indorsed by a bank to a person who is not a bank.

SOURCES: Codes, 1942, § 41A:4-201; Laws, 1966, ch. 316, § 4-201; Laws, 1992, ch. 420, § 83, eff from and after January 1, 1993.

Cross References — Indorsement, how made, see § 75-3-202.

Special indorsement, see § 75-3-204.

What is restrictive indorsement, see § 75-3-205.

Effect of restrictive indorsement, see § 75-3-206.

Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

Transfer between banks, methods which identify transferor bank, see § 75-4-206.

When bank has security interest in item and accompanying documents, see § 75-4-210.

Finality of settlement of item by means of remittance instrument or authorization to charge, see § 75-4-213.

Charge back of items, see § 75-4-214.

When item is finally paid by payor bank, see § 75-4-215.

Risk of loss in event of insolvency, see § 75-4-216.

Payor bank's accountability with respect to item presented on or received by it, see § 75-4-302.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.
2. Collecting bank as agent.
3. Liability.
4. Collecting bank as holder.
5. —As holder in due course for value.

B. Pre-Uniform Commercial Code Decisions.

6. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

A bank in which checks, given in payment of a life insurance claim, were deposited, thereby became the debtor of the designated principal and not of the depositor, who acted in her behalf, and consequently the designated principal received payment of her claim, as far as the life insurance company was concerned, stating that the same result would be reached under the Uniform Commercial Code, and referring to this section. *Savidge v. Metropolitan Life Ins. Co.*, 380 Pa. 205, 110 A.2d 730 (1955).

2. Collecting bank as agent.

Where (1) general contractor, on being informed of subcontractor's failure to pay supplier for two transformers, gave check for cost of transformers to subcontractor's employee, (2) at bottom of check, which

was made payable to order of defendant bank for subcontractor's account, was drawer's notation that it was issued for transformers in suit, (3) subcontractor's employee, on delivering check to bank, instructed bank to apply proceeds to certain sight drafts drawn on subcontractor, none of which covered transformers in suit, and (4) bank complied with employee's instructions drawer of check (general contractor) could not successfully contend that under UCC 4-201(1), dealing with agency status of collecting banks, bank was supplier's agent and should have applied check's proceeds to pay supplier for transformers, since under UCC § 4-201, a collecting bank is not a general agent, its agency status being limited to collection of items. *United States ex rel. Westinghouse Elec. Corp. v. Sommer Corp.*, 580 F.2d 179 (5th Cir. C.Z. 1978) (holding, in *Miller Act* suit, that bank was justified in following instructions of subcontractor's employee on application of check's proceeds).

In a corporation's suit against a bank for recovery of amount of check which the bank received for account of the corporation which had previously closed out its account, the court held that the bank had failed to meet its statutory obligation to use ordinary care when, contrary to the unqualified written instructions of the plaintiff, it (1) seized and deposited the checks under closed account of plaintiff and (2) having deposited the checks, failed to remit all balances to the plaintiff's

account in North Carolina, as instructed. The court also said that the argument could be made that under § 4-201 of the UCC, at the closing of the account, the bank no longer remained an agent of the plaintiff and for that reason alone had no authority to accept, deposit or disburse checks payable to the plaintiff. *General Apparel Sales Corp. v. Chase Manhattan Bank*, 321 F. Supp. 891 (S.D.N.Y. 1970).

Presumption that collecting bank acts as agent for depositor under Code § 4-201(1) presupposes that bank acts in accordance with its duty imposed by law; this requires presentation to payor bank in due course of business and, if check is dishonored, notice to its depositor "by its midnight deadline or within a longer reasonable time" under circumstances as stated in Code § 4-212(1); if there is substantial failure of bank to perform this duty, bank loses right of charge-back granted in Code § 4-212. *First Sec. Bank v. Ezra C. Lundahl, Inc.*, 22 Utah 2d 433, 454 P.2d 886 (1969).

Key words "payable through Manufacturer's National Bank" on face of instrument grant bank status of "collecting bank" rather than that of "payor bank" under Code § 3-120; any settlement made by collecting bank until settlement is actually finalized, is only provisional in nature with bank becoming agent or sub-agent of owner of instrument under Code § 4-201. *Manufacturers Nat'l Bank v. Sutherland*, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

Prior to final settlement a collecting bank is merely the agent for collection of a check deposited by the owner and any settlement is provisional. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

3. Liability.

Where payee endorsed and deposited check in his account with bank, bank credited payee's account and forwarded check to foreign payor bank for payment, and payee withdrew full amount of deposit before dishonor of check by payor bank, payee remained owner of check and bank was agent for collection, so that credit given for deposit was only provisional settlement and risk of loss on check remained in payee as owner, and not upon

agent bank; and bank's failure to make formal protest was immaterial since payee's liability was based not on his endorsement of check but on his status as depositor and withdrawer of funds. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

4. Collecting bank as holder.

Company whose checks were cashed by bank upon forged indorsement could not base its right to recover from bank on guarantee contained in indorsement reading, "Pay to Any Bank, Banker or Trust Company. All Prior Indorsements Guaranteed"; in effect, that indorsement coupled with delivery of checks to company destroyed their negotiability. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

A bank which accepts a check for collection and, for that purpose, acts as its depositor's agent is also a holder of the check, and the fact that it does not own the item is immaterial insofar as its status as a holder is concerned. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

5. —As holder in due course for value.

Creation of agency relationship under UCC § 4-201 was not intended to impair depository bank's rights as holder in due course; held, while collecting bank is presumed to be agent of owner, it may at same time be holder in due course of deposited item. *Long Island Nat'l Bank v. Zawada*, 34 A.D.2d 1016 (2d Dep't 1970) (citing annotation).

The fact that the bank is merely a collecting agent does not prevent it from being the holder in due course of the item it is collecting when it has satisfied all the requirements thereof. *Waltham Citizens Nat'l Bank v. Flett*, 353 Mass. 696, 234 N.E.2d 739 (1968).

Where the full amount of credit given to the drawer of seven drafts was withdrawn, the bank which held them possessed a security interest to that extent in the instruments and a concomitant status as a holder in due course. *F & M Nat'l*

Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

A bank holding a check returned to it marked "unpaid" because of maker's death which, prior to maker's death, had given the payee immediate credit therefor becomes a holder for value of decedent's check prior to his death. *Sandler v. United Indus. Bank*, 23 A.D.2d 567 (2d Dep't 1965).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

This section of the Uniform Commercial Code will alter the result of a case holding that where a bank customer deposited a

check in his account, indorsing it "for deposit only to the credit of" the depositor, and subsequently the bank allowed him to draw against the uncollected check, the bank was not holder in due course. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

A bank which receives checks for collection only and indorsed without restriction and which, although not required to do so, allows its customer to draw to the full amount of the checks before they have been collected becomes a holder for value of the checks. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

B. Pre-Uniform Commercial Code Decisions.

6. In general.

Collecting bank held agent of depositor of claim. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 4, dealing with bank deposits and collections. 18 A.L.R.3d 1376.

Construction and application of UCC § 4-205(1) allowing depositary bank to supply customer's indorsement on item for collection. 29 A.L.R.4th 631.

Am Jur. 10 Am. Jur. 2d, Banks § 721.

11 Am. Jur. 2d, Banks §§ 895, 897, 937, 970, 972, 988.

12 Am. Jur. 2d, Bills and Notes § 632.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:77, 4:78 (Status and duties of collecting banks).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2281 et seq. (Agency status of collecting banks).

CJS. 9 C.J.S., Banks and Banking §§ 382 et seq.

§ 75-4-202. Responsibility for collection or return; when action timely.

(a) A collecting bank must exercise ordinary care in:

- (1) Presenting an item or sending it for presentment;
- (2) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;
- (3) Settling for an item when the bank receives final settlement; and
- (4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time

may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to subsection (a)(1), a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit.

SOURCES: Codes, 1942, § 41A:4-202; Laws, 1966, ch. 316, § 4-202; Laws, 1992, ch. 420, § 84, eff from and after January 1, 1993.

Cross References — Standard requirement of good faith, see § 75-1-203.

Presentment, notice of dishonor and protest, generally, see §§ 75-3-501 et seq.

Time for presentment, see § 75-3-503.

Manner of presentment, see § 75-3-504.

Fixing cutoff hour for handling of items, see § 75-4-108.

Delays as result of good faith effort by collecting bank to secure payment, or due to circumstances beyond its control, see § 75-4-109.

Forwarding of item to be presented, see § 75-4-204.

Presentment by means of written notice, see § 75-4-212.

Provisional settlement, charge back and return of item, see § 75-4-214.

Deferred posting, see § 75-4-301.

Payor bank's accountability for item presented on and received by it, see § 75-4-302.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.
2. Particular duties.

B. Pre-Uniform Commercial Code Decisions.

3. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Under UCC § 4-202(1), a collecting agent's duties and authority are (1) to present the item or send it for presentment, (2) to notify its transferor of non-payment or dishonor, and (3) to settle for the item when it receives final settlement. *United States ex rel. Westinghouse Elec. Corp. v. Sommer Corp.*, 580 F.2d 179 (5th Cir. C.Z. 1978).

2. Particular duties.

Collecting bank, which held for 52 days after presentment for payment three sight drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503(2); and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. *Southern Cotton Oil Co. v. Merchants Nat'l Bank*, 670 F.2d 548 (5th Cir. 1982).

In an action by a vendor against a collecting bank which was unable to obtain foreign exchange in United States dollars for the full amount of the proceeds of three shipments of electrical equipment which had been shipped to Santo Domingo and had been fully paid for by the vendee in Dominican pesos, summary judgment was properly granted to the defendant, since the liability of a bank for action or

nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located (Uniform Commercial Code, § 4-102, subd [2]), and defendant's ability to remit the funds had been restricted by Dominican law; moreover, defendant, as a collecting bank, neither breached its agreement with plaintiff nor failed to exercise ordinary care (Uniform Commercial Code, § 4-202) by collecting the sight drafts in Dominican pesos, since prior conduct of the parties indicated that the instructions on the sight drafts which stated that collections were to be made in United States dollars were to be construed to mean only that the ultimate remittance was to be in dollars. *Douglaston Elec. Sales, Inc. v. Royal Bank of Canada*, 69 A.D.2d 565 (2d Dep't 1979).

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned

them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

In suit by cattle sellers against bank under UCC § 4-202(1) and (2) for bank's negligently holding, on corporate-cattle buyer's instructions, unpaid drafts given sellers in payment for their cattle beyond bank's midnight deadline, where evidence showed (1) that drafts were received by bank between September 20 and September 28, 1973, but were not returned to sellers' banks until October 3, 1973, when corporate buyer collapsed following failure of efforts to rescue it from insolvency, (2) that bank itself was declared insolvent on October 4, 1973 because of unsecured credit extensions to buyer, (3) that sellers were unsecured creditors of buyer, (4) that

cattle had been sold to buyer in ordinary course of business before drafts arrived at bank, (5) that even with timely notice of nonpayment of drafts, sellers could not have recovered by stopping delivery of cattle or replevying them, and (6) that sellers as matter of law could not have recovered amount of drafts through liens on buyer's assets, since such assets were already subject to valid prior liens, district court properly held that there was sufficient evidence to show that bank had failed to use ordinary care in handling drafts. However, district court erred in denying bank's motion for judgment n. o. v. and in accepting sellers' contention that other evidence in case supported possibility that drafts were collectible, since that possibility was exceedingly remote and under UCC § 4-103(5), governing damages for failure to exercise ordinary care in handling items, sellers to be entitled to recover damages from bank were required to show existence of reasonable chance of collecting on drafts. *Marcoux v. Van Wyk*, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

In action against collecting bank by cattle dealers who had drawn sight drafts on cattle buyer through collecting bank for purchase price of cattle delivered to buyer, alleging that collecting bank was negligent in failing to return unpaid drafts within requisite midnight deadline, collecting bank failed to carry burden of proving that it had taken seasonable action under UCC § 4-202(2), with respect to sight drafts returned after its midnight deadline, by demonstrating course of dealings between buyer and cattle sellers acquiesced in by collecting bank or by "custom and usage" as it related to collecting banks and utilization of sight drafts in cattle industry, where cattle dealers' prior dealings with buyer, if any, amounted to isolated incidences rather than course of dealings which established certain expectations or common basis of understanding between the parties, where there was uncontroverted testimony by other bankers to effect that it was not custom of their bank or banks with which they were familiar, when acting as collecting banks, to hold comparable sight drafts beyond mid-

night deadline, and where cattle dealers did not acquiesce in collecting bank's handling of drafts, having taken immediate action to reclaim cattle when made fully aware of buyer's concealed inability to pay draft. *Marcoux v. Mid-States Livestock, Inc.*, 429 F. Supp. 155 (N.D. Iowa 1977), aff'd, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

In action by seller to recover for negligent handling of sight drafts sent to bank accompanied by invoices for meat shipped to buyer where, inter alia, portion of drafts which directed payor to charge certain account was left blank: (1) bank was "collecting bank" obligated under UCC § 4-202 to exercise ordinary care in presenting drafts for payment to buyer rather than "payor bank;" (2) there were questions of fact, precluding summary judgment, as to whether bank's delay in holding drafts for more than 30 days, after buyer told bank to hold drafts without making payment, before returning them to seller unpaid was reasonable in light of financial condition of buyer and whether seller could have realized face value of drafts if notified of dishonor sooner than it was. *Whitehall Packing Co. v. First Nat'l City Bank*, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Collecting bank's failure to return sight drafts immediately after its customer, the drawee of the drafts, instructed bank to hold them, instead of authorizing payment, did not constitute failure to return drafts seasonably or to use ordinary care in handling them where drawer of drafts was interested in payment and for bank to have returned each draft by midnight deadline would not have achieved that result; where bank knew that, under similar circumstances drawee did not at once authorize payment of other shipper's drafts, but did so after some delay, in one instance as long as 25 days; and where evidence showed that drawee could not pay for merchandise until it was sold and that in fact it used proceeds of sales to pay drawer outstanding balance on open account. *Wilhelm Foods, Inc. v. National Bank of N. Am.*, 388 F. Supp. 1376 (S.D.N.Y. 1974) (applying New York Law).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depository, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. *Isaacs v. Chartered New England Corp.*, 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Collecting agent clearly has right to demand repayment from defendants on dishonor of instrument, provided plaintiff had performed all of necessary duties of collecting bank under Code § 4-202. *Manufacturers Nat'l Bank v. Sutherland*, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

Duty of ordinary care imposed on collecting bank does not create duty of ascertaining whether given check was issued by mistake; California Code comment states quite clearly that this section changes prior California law only in that it changes basis of recovery against collecting banks from negligence theory to warranty theory, and that Code does not change rules or principles by which such recovery is established. *Frontier Ref. Co. v. Home Bank*, 272 Cal. App. 2d 630 (2d Dist. 1969).

Where broker's representative with knowledge of nonpayment of drafts instructed collecting banks to hold and not return drafts, any delay in handling drafts was result of obeying broker's instructions and bank had not failed to carry out its responsibilities to customer. *Phelan v. University Nat'l Bank*, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

Where a check had been accepted by the drawee bank for collection the bank be-

comes the collecting agent of the holder and is required to use ordinary or reasonable diligence and care in making the collection. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

Where the defendant, a collecting bank, had properly presented plaintiff's sight draft to the drawee and the draft was uncollectible because of the Cuban nationalization of banks in which the drawee's funds were deposited, and subsequently funds of the drawee came into possession of the defendant in the course of normal commercial transactions unrelated to the agency relationship, the defendant could properly apply the money to debts owed to it, and there was no purpose in requiring the defendant to notify the plaintiff of the existence of the fund and no liability would flow from the failure to do so. *Hydrocarbon Processing Corp. v. Chemical Bank N.Y. Trust Co.*, 16 N.Y.2d 147, 209 N.E.2d 806 (1965).

A bank which exercises ordinary care in its unsuccessful efforts to collect a draft for its principal is not thereafter precluded from applying on a debt due to its funds of the common debtor, which in good faith came into its possession through a transaction unrelated to the agency relationship. *Hydrocarbon Processing Corp. v. Chemical Bank N.Y. Trust Co.*, 16 N.Y.2d 147, 209 N.E.2d 806 (1965).

B. Pre-Uniform Commercial Code Decisions.

3. In general.

Collecting bank cannot extend time of payment. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank held guilty of negligence and liable to payee for amount of check. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence

as to custom of banks in locality in handling and dealing with checks and other

items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks §§ 978, 990-992.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:71 et

seq. (Status and duties of collecting banks).

17 Am. Jur. Proof of Facts 3d 541, Banking Negligence — Improper dishonor of Letter of Credit.

CJS. 9 C.J.S., Banks and Banking §§ 325, 408, 409, 411, 414.

§ 75-4-203. Effect of instructions.

Subject to Chapter 3 concerning conversion of instruments (Section 75-3-420) and restrictive indorsements (Section 75-3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor.

SOURCES: Codes, 1942, § 41A:4-203; Laws, 1966, ch. 316, § 4-203; Laws, 1992, ch. 420, § 85, eff from and after January 1, 1993.

Cross References — Effect of restrictive indorsement, see § 75-3-206.

Conversion of instruments, see § 75-3-419.

Restrictive indorsement, discharge of liability of any party (other than intermediary bank or payor bank which is not depositary bank) who pays or satisfies holder of instrument so indorsed, see § 75-3-603.

Agreement which cannot disclaim collecting bank's responsibility for own lack of good faith or failure to exercise ordinary care, see § 75-4-103.

Intermediary bank, or payor bank which is not also depositary bank, permitted to ignore restrictive indorsement of any person except bank's immediate transferor, see § 75-4-205.

JUDICIAL DECISIONS

1. In general.

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on

breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second

collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and since during interim depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account,

under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

RESEARCH REFERENCES

ALR. Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks § 976.
6 Am. Jur. Pl & Pr Forms (Rev), Bank

Deposits and Collections, Form 4:76 (Answer; defense; collecting bank followed instructions of transferor).

CJS. 9 C.J.S., Banks and Banking §§ 408, 409, 411, 414.

§ 75-4-204. Methods of sending and presenting; sending directly to payor bank.

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

- (1) An item directly to the payor bank;
- (2) An item to a nonbank payor if authorized by its transferor; and

(3) An item other than documentary drafts to a nonbank payor, if authorized by Federal Reserve regulation or operating circular, clearing-house rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

SOURCES: Codes, 1942, § 41A:4-204; Laws, 1966, ch. 316, § 4-204; Laws, 1992, ch. 420, § 86, eff from and after January 1, 1993.

Cross References — Presentment, how made, see § 75-3-504.
Collection of documentary drafts, see §§ 75-4-501 to 75-4-504.

JUDICIAL DECISIONS

1. In general.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-1023; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing

and remanding case for new trial because of improper instructions to jury).

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). *Rapp v. Dime Sav. Bank*, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

A collecting bank is expressly authorized by UCC § 4-204(2) to send an item directly to a payor bank instead of placing item for collection through regular clearing house channels, and collecting bank is not thereby relieved of its duty to notify payor bank that check would not be paid. *Central Bank & Trust Co. v. First Northwest Bank*, 332 F. Supp. 1166 (E.D. Mo. 1971), aff'd, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom in banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks §§ 970, 976, 980, 981.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:80 (Procedure for sending check or other item for collection).

CJS. 9 C.J.S., Banks and Banking §§ 408, 409, 411, 414.

§ 75-4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of Section 75-3-302, it is a holder in due course; and

(2) The depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account.

SOURCES: Codes, 1942, § 41A:4-205; Laws, 1966, ch. 316, § 4-205; Laws, 1992, ch. 420, § 87, eff from and after January 1, 1993.

Cross References — Effect of restrictive indorsement, see § 75-3-206.

Conversion of instrument, see § 75-3-419.

Discharge of liability of any party to extent of payment or satisfaction to holder; effect as to liability of party who pays in manner not consistent with terms of restrictive indorsement, see § 75-3-603.

Effect of instructions given to collecting bank, see § 75-4-203.

JUDICIAL DECISIONS

1. In general.

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. *Bank Leumi Trust Co. v. Marine Midland Bank*, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

UCC § 4-205, which provides that bank is "holder" of item delivered to it for collection or for credit to deposit account of transferor, was inapplicable to, and did

not make bank a holder of, unindorsed notes, where it received notes as collateral for loan. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

Under UCC § 4-205(1), bank was fully within its rights in cashing cashier's check upon receiving it from forwarding bank, notwithstanding check was not endorsed, where forwarding bank had stamped check "credited to account of within named payee, absence of endorsement guaranteed." *Main Bank v. Davy Crockett Inn of New Braunfels, Inc.*, 531 S.W.2d 388 (Tex. Civ. App. 1975).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of setoff against payee. *United Overseas Bank v. Veneers, Inc.*, 375 F. Supp. 596 (D. Md. 1973) (applying Maryland law).

That the payee's endorsement may have been supplied by the collecting bank as

the depositary bank which had taken the item for collection does not affect the collecting bank's status as a holder in due course. *Central Bank & Trust Co. v. First Northwest Bank*, 332 F. Supp. 1166 (E.D. Mo. 1971), *aff'd*, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

Where a bank places on the item deposited by its customer a statement indicating that it has been credited to its customer's account, such statement has the effect of an indorsement by the customer but does not make the bank subject in any

way to any dispute between the drawer of the check and the payee. *Cole v. First Nat'l Bank*, 433 P.2d 837 (Wyo. 1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, or evidence as to custom in banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Construction and application of UCC § 4-205(1) allowing depositary bank to

supply customer's indorsement on item for collection. 29 A.L.R.4th 631.

Am Jur. 10 Am. Jur. 2d, Banks § 721.

11 Am. Jur. 2d, Banks §§ 895, 976, 978.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:91, 4:92 (Missing indorsement; restrictive indorsement).

CJS. 10 C.J.S., Bills and Notes § 161.

§ 75-4-206. Transfer between banks.

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.

SOURCES: Codes, 1942, § 41A:4-206; Laws, 1966, ch. 316, § 4-206; Laws, 1992, ch. 420, § 88, *eff from and after January 1, 1993*.

Cross References — Effect of transfer generally, see § 75-3-201.

Negotiation, see § 75-3-202.

What constitutes negotiation, generally, see § 75-3-202.

JUDICIAL DECISIONS

1. In general.

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were endorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature

of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. *West Penn Admin., Inc. v. Union Nat'l Bank*, 233 Pa. Super. 311, 335 A.2d 725 (1975).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks § 721. **CJS.** 9 C.J.S., Banks and Banking
11 Am. Jur. 2d, Banks §§ 895, 970, 976, §§ 445-451, 486.
978, 980.

§ 75-4-207. Transfer warranties.

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

- (1) The warrantor is a person entitled to enforce the item;
- (2) All signatures on the item are authentic and authorized;
- (3) The item has not been altered;
- (4) The item is not subject to a defense or claim in recoupment (Section 75-3-305(a)) of any party that can be asserted against the warrantor; and
- (5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in Sections 75-3-115 and 75-3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made “without recourse” or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: 4-207; Laws, 1966, ch. 316, § 4-207; Laws, 1992, ch. 420, § 89, eff from and after January 1, 1993.

Editor’s Note — Provisions contained in former § 75-4-207 can now be found in §§ 75-4-207, 75-4-208, and 75-4-209.

Cross References — Effect of transfer of commercial paper, generally, see § 75-3-201.

Engagement of indorser of commercial paper, see § 75-3-414.

Warranties on presentation of commercial paper, see § 75-3-417.

Finality of payment or acceptance of commercial paper, see § 75-3-418.

Presentment, how made, see § 75-3-504.

Transfers from one bank to another, see § 75-4-206.

Security interest of collecting bank, see § 75-4-210.

Collecting bank as holder in due course, see § 75-4-211.

Customer's duty to examine bank statements and items to discover unauthorized signature or alteration and to notify bank, see § 75-4-406.

JUDICIAL DECISIONS

1. In general; purpose.
2. Warranty to drawer.
3. Obligation of inquiry.
4. Warranty of title.
5. Genuine or authorized signature.
6. Absence of indorsement; words of guaranty.
7. Measure of damages.
8. Reasonable notice of claim.
9. Practice and procedure.

1. In general; purpose.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. *State v. Jackson*, 383 So. 2d 781 (La. 1980), cert. denied, 449 U.S. 1010, 101 S. Ct. 565, 66 L. Ed. 2d 468 (1980).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send

check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC § 4-207(1)(a) is intended to give the legal effect presently obtained by the

words “prior endorsements guaranteed” in collection transfers and presentments between banks. The warranties and engagements arise automatically as a part of the bank collection process. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

UCC § 4-207 is intended to give the effect formerly obtained in bank collections by the words “prior endorsements guaranteed (PEG)” in collection transfers

and presentments between banks. The warranties and engagements under UCC § 4-207 arise automatically as a part of the bank collection process. *Guaranty Bank & Trust Co. v. Federal Reserve Bank*, 454 F. Supp. 488 (W.D. Okla. 1977) (applying Oklahoma law; holding that collecting bank, by receiving cashier's check over forged indorsements, failed to acquire good title to check, and that same result would have obtained in absence of bank's indorsing such check “P.E.G.”).

Rationale for imposing warranties on presentment is to speed of collection of transfers and checks and to take burden off each bank to meticulously check indorsements of each item transferred; held, this rationale suggests that burden be put directly upon first bank in collection chain to make sure that indorsements are valid, and subsequent banks are not negligent if they do not thoroughly inspect each item. *Federal Deposit Ins. Corp. v. Marine Nat'l Bank*, 303 F. Supp. 401 (M.D. Fla. 1969), *aff'd*, 431 F.2d 341 (5th Cir. Fla. 1970).

2. Warranty to drawer.

On plaintiff payor bank's motion for summary judgment in action to recover from indorser amount paid out on check on which drawer's signature had been forged, court held (1) that under UCC § 3-418, plaintiff was bound by its payment if no warranties were applicable and defendant indorser was either holder in due course or one who had in good faith changed his position in reliance on such payment; (2) that since record in case contained no allegations as to defendant's knowledge of forgery of drawer's signature, court could not determine whether defendant had breached its warranty under UCC § 4-207(1)(b) to plaintiff; (3) that record also contained insufficient information as to whether defendant was holder in due course or one who had in good faith changed his position in reliance on plaintiff's payment; and (4) that plaintiff's contention that it was subrogated under UCC § 4-407(c) to rights of drawer of check in suit against holder thereof, because plaintiff had paid check under circumstances giving drawer right to object to such payment, lack merit since customer's limited warranty under UCC § 4-207(1)(b) that

he had no knowledge that drawer's signature was unauthorized is not even given to drawer with respect to drawer's own signature by customer who is holder in due course and has acted in good faith (see UCC § 4-207(1)(b)(ii)). *Marine Midland Bank v. Umber*, 96 Misc. 2d 835 (1978) (holding that summary judgment could not be granted to either plaintiff or defendant).

Warranties imposed on a collecting bank under UCC §§ 4-207(1) and (2) run to payor bank or other payor and to that bank's transferee and to any subsequent collecting bank, but not to drawer. *Life Ins. Co. v. Snyder*, 141 N.J. Super. 539, 358 A.2d 859 (1976).

Drawer of check which has been charged to its account under forged indorsement can directly sue depository and collecting banks which have warranted validity of indorsement, on implied contract theory under which drawer becomes third party beneficiary of warranties and guaranties given by these banks to subsequent persons in chain of negotiation back to drawee bank. *Allied Concord Fin. Corp. v. Bank of Am.*, 275 Cal. App. 2d 1 (2d Dist. 1969).

3. Obligation of inquiry.

Code places burden directly upon first bank in collection chain to make sure that indorsements on check are valid; and there is no duty either under law merchant or under UCC for drawee bank to verify indorsement of payee on check which comes to it from collecting bank under warranty of indorsement. *Birmingham Trust Nat'l Bank v. Central Bank & Trust Co.*, 49 Ala. App. 630, 275 So. 2d 148 (Civ. App. 1973), cert. denied, 290 Ala. 362, 275 So. 2d 153 (1973).

4. Warranty of title.

Endorser of forged check warrants that all signatures and certification on check are genuine and authorized and becomes obligated, upon dishonor, to pay instrument according to its tenor. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

The warranty of good title under UCC § 4-207(1)(a) even applies to a cashier's check. *Seattle-First Nat'l Bank v. Pacific*

Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Although the Uniform Commercial Code does not define "good title," a good-title warranty under UCC § 4-207(1)(a) is a warranty of the genuineness of indorsements. The purpose of the warranty is to place on a bank that takes an instrument from a person making an unauthorized indorsement the responsibility for collecting from that person. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

A successful action for a breach of the warranty of good title under UCC § 4-207(1)(a) does not depend on whether the named payee actually had an interest in the check that could have been asserted. Instead, a breach of the warranty occurs when a collecting bank presents a check containing a forged or unauthorized indorsement to a drawee bank and receives payment on such check. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

The implied warranty of good title created by UCC § 4-207(1)(a) does not run in favor of a payee. Instead, it runs from a customer or collecting bank which obtains payment or acceptance of an item or transfers an item for value to each subsequent payor bank or other payor which, in good faith, pays or accepts the item. *Continental Cas. Co. v. Huron Valley Nat'l Bank*, 85 Mich. App. 319, 271 N.W.2d 218 (1978).

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that

they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. *Bank Leumi Trust Co. v. Marine Midland Bank*, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

Where (1) plaintiff lending bank issued cashier's check for \$3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through co-defendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to bor-

rower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. *Guaranty Bank & Trust Co. v. Federal Reserve Bank*, 454 F. Supp. 488 (W.D. Okla. 1977) (applying Oklahoma law).

Partner who deposited check bearing forged indorsement into partnership account was liable for amount of check under warranty of title contained in UCC § 4-207(2) where partnership was customer of bank within meaning of UCC § 4-104, check was credited to partnership, and partner was liable under state law for partnership debts. *Kelton Motors, Inc. v. Phoenix of Hartford Ins. Cos.*, 522 F.2d 728 (2d Cir. Vt. 1975) (applying Vermont law).

In action by insurance claimant against insurance carrier on uninsured motorist's coverage where insurer issued draft payable to claimant and her attorney, attorney without authority endorsed name of his client to draft, received payment therefore and absconded without accounting to client, and where claimant was permitted to recover from insurance company, insurance company was entitled to indemnity against collecting bank; collecting bank was liable to insurer as drawee of draft under its warranty of good title under UCC § 4-207(1)(a) and it was not entitled to assert defense of having acted in good faith and in accordance with reasonable commercial standards under UCC

§ 3-419(3). *First Nat'l Bank v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226 (Ky. 1974).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's payees was forged. *Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co.*, 514 S.W.2d 860 (Mo. Ct. App. 1974).

Payor bank is in effect strictly liable to true owner if it pays instrument on forged endorsement, and collecting banks that handled instrument for collection are, in turn, strictly liable to payor bank for breach of warranty of good title. *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Collecting bank which forwarded for collection check on which there was forged indorsement breached its warranty that it had good title to check or that it was authorized to obtain payment on behalf of one who had good title and, therefore, was cast in damages to payor bank. *Myers v. First Nat'l Bank*, 42 A.D.2d 657 (3d Dep't 1973).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments; a collecting bank which obtains payment on cashier's checks bearing forged indorsements is liable to the payor bank on its warranty that it has good title to the instruments. *Society Nat'l Bank v. Capital Nat'l Bank*, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

5. Genuine or authorized signature.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "les-

sees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

When a check is negotiated on the basis of a forged indorsement, the drawee bank

may not charge the drawer's account. However, it does have the right to recover payment of the check from a prior collecting bank. A collecting bank that presents and receives payment for a check with a forged indorsement is liable for a breach of the warranty of good title created by UCC § 4-207(1)(a). Conversely, a collecting bank has a right of recovery from prior parties for a breach of the warranties of good title and genuineness of signatures. The recrediting of the drawer's account, the recovery by the drawee bank from the collecting bank, and the judgment in favor of the collecting bank against the forger is the progression contemplated by the Uniform Commercial Code. Rights of recovery continue until the party who took the check from the forger is reached. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Collecting bank's warranty when presenting check that falsely purported to have been signed by drawer's agent was limited under UCC § 4-207(1)(b)(iii) to representation that it had no knowledge that drawer's signature was unauthorized. *Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y.*, 59 A.D.2d 645 (4th Dep't 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers'

savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where customer with checking accounts at both plaintiff and defendant banks began kiting checks between such accounts and defendant, on discovering such practice, thereafter refused to honor checks drawn by customer on account with defendant, which were deposited in customer's account with plaintiff and then presented by plaintiff to defendant for payment; and where defendant continued to accept deposits by customer in account with defendant of checks drawn on customer's account with plaintiff, which checks were paid by plaintiff, in conversion action in which plaintiff sought return of funds thus accumulated in customer's account with defendant and alleged that defendant intended to apply such funds to extinguish customer's debts to defendant that would become due in future, (1) in absence of fiduciary relationship or other legal duty, defendant was not obligated to inform plaintiff that customer was kiting checks; (2) defendant had right to continue to accept for deposit checks drawn by customer on account with plaintiff, to present such checks to plaintiff for payment, and to refuse to honor checks drawn by customer on account with defendant that were deposited in account with plaintiff; (3) plaintiff was required to pay checks drawn by customer on account with it or to return such checks by midnight deadline provided by UCC § 4-

104(1)(h); (4) when plaintiff paid such checks, it no longer owned funds represented thereby, and defendant thus did not convert any funds belonging to plaintiff; (5) only the customer, and not plaintiff, could complain about defendant's refusal to honor checks drawn by customer on account with defendant or defendant's applying funds accumulated in customer's account to extinguish customer's debts to defendant; and (6) defendant breached no warranty owed to plaintiff under UCC § 4-207 because all that defendant warranted, as holder of checks presented to plaintiff for payment, was that defendant had good title to such checks and that it had no knowledge that drawer's signature was unauthorized. *Citizens Nat'l Bank v. First Nat'l Bank*, 347 So. 2d 964 (Miss. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

Collecting bank which guaranteed indorsement of checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer's account. *First Bank & Trust Co. v. County Nat'l Bank*, 281 So. 2d 515 (Fla. App. 1973).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check for the loan amount made payable to the borrower and his father-in-law, which check was subsequently cashed at Bank 2 upon the borrower's

endorsement and an unauthorized indorsement purportedly the signature of the father-in-law, and such check was eventually presented to Bank 1 and paid by it, Bank 2 was liable to Bank 1 under UCC §§ 3-404(1) and 4-207(2)(b). *Franklin Nat'l Bank v. Chase Manhattan Bank*, 68 Misc. 2d 880 (1972).

Where collecting bank obtained possession of check by unauthorized indorsement and transferred check to drawee bank by collecting bank's indorsement, receiving the amount thereof, collecting bank under UCC § 4-207 warranted to drawee bank which took item in good faith that all signatures were genuine or authorized, and collecting bank was liable to drawee bank for breach of that warranty. *Mississippi Bank & Trust Co. v. County Supplies & Diesel Serv., Inc.*, 253 So. 2d 828 (Miss. 1971).

A payor-drawee bank cannot recover from the collecting bank for the breach of a warranty that the signature of the payee on the indorsement was genuine when the signature, otherwise a forgery, comes within the impostor provision of UCC § 3-405(1)(b) by which the indorsement forged by the payee is effective as a negotiation, because the payor-drawee bank can show no loss caused by the forgery. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

A trust company which paid money to its customer upon checks bearing forged indorsements had a valid claim against its customer to recover the money paid because it was paid under a mistake of fact, stating that this section and § 3-417 of the Uniform Commercial Code will deal with this subject matter. *Krinsky v. Pilgrim Trust Co.*, 337 Mass. 401, 149 N.E.2d 665 (1958).

6. Absence of indorsement; words of guaranty.

California UCC § 4-207(3) applies to missing endorsements, even when words "prior endorsement guaranteed" are not used by collecting bank, and negligence of drawee bank is not bar to recovery on statutory guarantees. *Feldman Constr. Co. v. Union Bank*, 28 Cal. App. 3d 731 (2d Dist. 1972).

7. Measure of damages.

The word "expenses" in the last sentence of UCC § 4-207(3) includes ordinary collection expenses and, in appropriate cases, attorneys' fees. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Collecting bank which guaranteed indorsement of fictitious payee was not liable under § 4-207 for breach of warranty to drawee bank which paid check and thus sustained no insured loss in refunding payment. *Aetna Life & Cas. Co. v. Hampton State Bank*, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Drawee bank which paid a forged instrument was not entitled to retain amount, paid to it by collecting bank which mistakenly believed it had a legal obligation to reimburse drawee, and which further mistakenly believed that collecting bank's depositor would not object to being charged with funds represented by a forged check. *Valley Bank v. Bank of Commerce*, 74 Misc. 2d 195 (1973), aff'd in part and rev'd in part, 13 U.C.C. Rep. Serv. (Callaghan) 515 (N.Y. App. Term 1973).

8. Reasonable notice of claim.

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of war-

ranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which

checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

Depository bank that collected check bearing forged endorsement was liable to collecting bank on its warranty of good title and guarantee of prior endorsements under UCC § 4-207(1), and collecting bank was similarly liable to drawee bank, notwithstanding drawer delayed 6 months in notifying drawee of suspected forgery; assuming drawer's delay in notifying drawee of suspected forgery was unreasonable under UCC § 4-406, depository bank was not discharged from liability for breach of warranty of good title under UCC § 4-207(4) absent evidence that any party sustained loss caused by delay. *Michigan Nat'l Bank v. American Nat'l Bank & Trust Co.*, 34 Ill. App. 3d 30, 339 N.E.2d 375 (1st Dist. 1975).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plain-

tiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3), since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and, during interim, depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account, under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Bank that gave purchasers of cashier's checks timely notice of dishonor of endorsed draft used by purchasers in payment for cashier's checks thereby preserved its right to charge purchasers on their contract of indorsement and coextensive warranties of transfer, so as to permit offset of any liability by bank to purchasers for wrongful stoppage of payment on cashier's checks. *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620 (7th Cir. Ill. 1973) (applying Illinois law).

In action on note by payee whose endorsement was forged by second payee, 3-year delay after knowledge of forgery in notifying endorser of claim against them was not reasonable time under UCC § 4-207(4). *Dobbins v. National Union Ins. Co.*, 70 Misc. 2d 1087 (1972).

9. Practice and procedure.

Plaintiff payor bank, which made payment of a check with a forged drawer's signature, and which is therefore bound by its payment if no warranties are applicable or if defendant, the prior indorser, was a holder in due course or a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), may not, on a motion for summary judgment, recover such payment from defendant pursuant to the warranty given by a customer of a payor bank with respect to the drawer's signature (Uniform Commercial Code,

§ 4-207, subd [1], par [b]) since triable questions of fact exist as to whether defendant had knowledge of the forgery, was a holder in due course or a person who in good faith changed his position in reliance on plaintiff's payment. Plaintiff's position is not improved by subrogation to the drawer's rights (Uniform Commercial Code, § 4-407, subd [c]) since a drawer's rights against a holder who has obtained payment of a check with a forged drawer's signature are even fewer than those of the payor bank, the limited warranty of section 4-207 (subd [1], par [b]) not being given to the drawer with respect to the drawer's own signature by any customer that is a holder in due course and acts in good faith. *Marine Midland Bank v. Umber*, 96 Misc. 2d 835 (1978).

Plaintiff drawee-payor bank is not entitled to summary judgment based on a breach of warranty of good title by defendant collecting bank (Uniform Commercial Code, § 4-207, subd [1]), which transferred to plaintiff checks lacking the indorsement of the named payees, since factual issues remain with respect to whether the drawer has the right to set up the missing indorsements as a bar to charging his account with the amounts of the checks. The checks, which were made out to fictitious payees, were credited to a corporate account even though the company was not the named payee. If the proceeds of the checks reached the entity intended to receive them, though made payable to variants of that entity's name, the drawer would be precluded from recovering as against plaintiff, which, in turn, would have no cause to proceed against defendant. In that event, any loss sustained would be attributable to plaintiff's voluntary decision to honor checks when its depositor's account had insufficient funds to cover them, and not to defendant's failure to secure necessary indorsements. *Bank Leumi Trust Co. v. Marine Midland Bank*, 93 Misc. 2d 41 (1977).

Where borrower obtained check, drawn to himself and automobile dealer, by misrepresenting to lender-drawer that he was purchasing automobile, and obtained payment of check upon forged indorsement of dealer from collecting bank, which for-

warded check to drawee bank, which paid check to collecting bank and charged account of drawer, "imposter rule" of § 3-405 was not applicable as defense to drawee bank's action against collecting bank for repayment under § 4-207. *East Gadsden Bank v. First City Nat'l Bank*, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Defendant insurance company was not entitled to summary judgment in action by plaintiff bank seeking to recover amount charged back against plaintiff bank by another bank as a result of alleged forged endorsement on draft issued by insurance company, where insurance company produced evidence showing the forged endorsement and an eventual charge-back to plaintiff bank who warranted good title to the draft in question when it deposited it with the other bank, where there was a showing by plaintiff bank of genuine issues for trial. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

Collecting bank is subject to suit by drawer for damages for breach of warranty resulting from payment of check on endorsement of less than all joint payees; defendants were authorized to implead collecting bank as third-party defendant, and entitled to summary judgment against bank, where third-party defendant bank cashed checks drawn by defendant-contractor payable jointly to plaintiff and subcontractor without plaintiff's endorsement. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted

the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

The final settlement of a deposited item, while terminating the collecting bank's right of charge-back in reliance upon a simple notification from the drawee bank, does not preclude the collecting bank from pursuing its remedies by way of plenary suit, in order to hold the depositor on its endorsement and the warranties connected therewith. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

A forged indorsement gives rise to a cause of action in favor of the drawee bank only if the drawer has the right to and does set up forgery as a bar to charge his account with the amount of the check. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of proving that the payee's indorsements had been forged. *Krinsky v. Pilgrim Trust Co.*, 337 Mass. 401, 149 N.E.2d 665 (1958).

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Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

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§ 75-4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may

recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Laws, 1992, ch. 420, § 90, eff from and after January 1, 1993.

Editor's Note — Provisions of this section are similar to provisions found in former § 74-4-207. Provisions formerly found in § 75-4-208 can now be found in § 75-4-210.

§ 75-4-209. Encoding and retention warranties.

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depository bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depository bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

SOURCES: Laws, 1992, ch. 420, § 91, eff from and after January 1, 1993.

Editor's Note — Provisions of this section are similar to provisions found in former § 74-4-207. Provisions formerly found in § 75-4-209 can now be found in § 75-4-211.

§ 75-4-210. Security interest of collecting bank in items, accompanying documents and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest

remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Chapter 9, but:

(1) No security agreement is necessary to make the security interest enforceable (Section 75-9-203(b)(3)(A);

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

SOURCES: Formerly § 75-4-208; Codes, 1942, § 41A:4-208; Laws, 1966, ch. 316, § 4-208; Laws, 1992, ch. 420, § 92; Laws, 2001, ch. 495, § 15, eff from and after Jan. 1, 2002.

Editor's Note — Provisions of this section were formerly found in § 75-4-208. Provisions formerly found in § 75-4-210 can now be found in § 75-4-212.

Amendment Notes — The 2001 amendment, effective January 1, 2002, substituted "(Section 75-9-203(b)(3)(A))" for "(Section 75-9-203(1)(a))" in (c)(1).

Cross References — Holder in due course, see § 75-3-302.

Taking for value, see § 75-3-303.

Collecting bank as agent of owner of item, see § 75-4-201.

Bank as holder in due course, see § 75-4-211.

Enforcement of security interest, see § 75-9-601 et seq.

When security interest attaches, generally, see § 75-9-203.

Perfection of security interest, see § 75-9-308 et seq.

Priorities among conflicting security interests in same collateral, see § 75-9-322.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-208.

6. In general; interest for credit withdrawn or applied.

7. —"Withdrawal".

8. Right of withdrawal as value.

9. Full interest regardless of withdrawal.

10. Advance on or against item.

11. Final settlement; realization of interest.

12. Practice and procedure.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-208.

6. In general; interest for credit withdrawn or applied.

Until there is final payment of an item, a collecting bank has a security interest under UCC § 4-208(1)(a) in any payment it may have made. *Rapp v. Dime Sav. Bank*, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Where (1) defendant drawer issued check to named payee for work performed

by payee, (2) payee deposited check in account with plaintiff collecting bank, (3) check was dishonored by drawee bank because of drawer's stop-payment order, and (4) drawer claimed that there was no consideration for check because payee had failed to complete work for which check was given, court held (1) that under UCC § 4-208(1)(a), plaintiff had security interest in check to extent to which credit given payee for check had been withdrawn or applied, (2) that plaintiff was entitled to recover loss caused by check's dishonor, and (3) that defendant drawer was primarily liable on such check. *Hackett v. Broadway Nat'l Bank*, 570 S.W.2d 184 (Tex. Civ. App. 1978).

Where customer deposited four checks drawn by defendant with plaintiff bank and bank credited customer's account, where bank then debited customer's account for amount of check written by customer, where defendant stopped payment on four checks and bank dishonored customer's check upon learning of customer's insolvency, and where bank exercised charge back rights by debiting customer's account for exact amount of four checks drawn by defendant, in action by bank against defendant for amount of four checks, bank was not entitled to recovery since bank had not given value for checks and was not a holder in due course within meaning of UCC § 4-208. Furthermore, bank's exercise of charge back rights under UCC § 4-212 made bank whole and recovery against defendant would permit double recovery in favor of bank. *GMAC v. Bank of Carroll County*, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depository bank obtained certification of check from drawee bank, drawee bank subsequently notified depository bank that it was rescinding its certification, but depository bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depository bank was not "holder in due course" under UCC § 4-209 notwithstanding customer owed money to depository bank and

bank had right to set-off such indebtedness against customer's account; since check was "deposited in an account" and since credit given was never withdrawn or applied, depository bank had no security interest in check under UCC § 4-208 and hence it had not given value under UCC § 3-303 or 4-209 at time it received notice of defense, it was not holder in due course under UCC § 4-209 and certification was not final in favor of depository bank under UCC § 3-418. *Rockland Trust Co. v. South Shore Nat'l Bank*, 366 Mass. 74, 314 N.E.2d 438 (1974).

UCC § 4-208 provides for bank to acquire security interest in items presented for collection under certain circumstances; this security interest is considered to be "value" for purposes of becoming holder in due course of item, and if bank meets other requirements of UCC § 3-302 it can become holder in due course of "item and any accompanying documents or the proceeds of either." *Commercial Disct. Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

Where a customer deposits a check with his bank and immediately writes his own check in the same amount with which latter check he pays a note he owes to the bank, the bank becomes the holder for value of the original check. *Waltham Citizens Nat'l Bank v. Flett*, 353 Mass. 696, 234 N.E.2d 739 (1968).

A bank which allows credit on a deposited check has a security interest therein to the extent to which credit was withdrawn, and is a holder "for value." *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

A bank which allows its depositor to make withdrawals against a check it has received for collection has a security interest in the check to the extent of such withdrawals, and it becomes a holder for value of the item, and if its taking is subject to no other infirmities it becomes a holder in due course. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it

has a security interest in the item and thereupon becomes a holder in due course of the check. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

By including §§ 4-208(1)(a) and 4-209, the draftsmen of the Uniform Commercial Code approved the majority rule at common law and under the Negotiable Instruments Law that where a bank customer deposits checks in his account, and the bank allows the customer to draw against the credit allowed for the checks, the bank is a holder in due course to the extent of its advances. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

7. —“Withdrawal”.

Where collecting bank had paid out money on forged check by permitting withdrawals from fictitious account, credit allowed for check in fictitious account had been withdrawn within meaning of § 4-208, so that collecting bank was holder for value. *Aetna Life & Cas. Co. v. Hampton State Bank*, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

8. Right of withdrawal as value.

Exception to rule that mere crediting of bank customer's account for deposited check does not constitute giving of value for such check occurs when the credit, under UCC § 4-208(1)(b), is “available for withdrawal as of right,” even though the credit is not drawn on. Under UCC § 4-213(4)(a), a credit is “available for withdrawal as of right” within reasonable time after bank learns of final settlement in collection process of check for which credit was given. Until such final settlement, in absence of any agreement between bank and depositor, bank should not be viewed as having given value until there is final payment of credited check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of

debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

9. Full interest regardless of withdrawal.

Security interests are established where correspondent bank credits amounts stated in letters of credit against debts owed to it by manufacturers. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 409 F.2d 711, 35 A.L.R.3d 1397 (1st Cir. Mass. 1969).

Bank has security interest in item to full extent of amount credited to account, regardless of whether withdrawals were made or not. *Atlantic Ref. Co. v. Director of Pub. Works*, 104 R.I. 436, 244 A.2d 853 (1968).

A bank accepting a forged check in satisfaction of an antecedent debt which acts in good faith and without notice of any infirmity in the instrument is entitled to receive payment thereof from the drawee bank. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

10. Advance on or against item.

A bank which cashes a check drawn on another bank has a security interest therein, and is a holder "for value." *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

11. Final settlement; realization of interest.

Under circumstances of case, where payment to bank by guarantor was made under express condition that bank would

continue to attempt to recover from drawee, payment was not "final settlement" within UCC § 4-208(3) and was not a realization of the bank's security interest. *First Nat'l Bank v. Jefferson Sales & Distribs., Inc.*, 341 F. Supp. 659 (S.D. Miss. 1971), *aff'd*, 460 F.2d 1059 (5th Cir. 1972) (applying Missouri UCC).

12. Practice and procedure.

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

RESEARCH REFERENCES

ALR. Lien of bank upon commercial paper delivered to it by debtor for collection. 22 A.L.R.2d 478.

Am Jur. 10 Am. Jur. 2d, Banks §§ 854, 855, 860.

11 Am. Jur. 2d, Banks §§ 987, 988.

11 Am. Jur. 2d, Bills and Notes § 208.

15A Am. Jur. 2d, Commercial Code § 8.

68A Am. Jur. 2d, Secured Transactions §§ 10, 35, 149.

69 Am. Jur. 2d, Secured Transactions §§ 167, 168, 801-803, 808-810.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:131, 4:132 (Security interest of collecting bank in items).

CJS. 9 C.J.S., Banks and Banking § 384.

§ 75-4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of Section 75-3-302 on what constitutes a holder in due course.

SOURCES: Formerly § 75-4-209:Codes, 1942, § 41A:4-209; Laws, 1966, ch. 316, § 4-209; Laws, 1992, ch. 420, § 93, *eff from and after January 1, 1993.*

Editor's Note — Provisions of this section were formerly found in § 75-4-209. Provisions formerly found in § 75-4-211 can now be found in § 75-4-213.

Cross References — Holder in due course generally, see § 75-3-302.

When holder takes instrument for value, see § 75-3-303.

Collecting bank's security interest, see § 75-4-210.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-209.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-209.

6. In general.

Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depositary bank obtained certification of check from drawee bank, drawee bank subsequently notified depositary bank that it was rescinding its certification, but depositary bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depositary bank was not "holder in due course" under UCC § 4-209, notwithstanding customer owed money to depositary bank and bank had right to set-off such indebtedness against customer's account. *Rockland Trust Co. v. South Shore Nat'l Bank*, 366 Mass. 74, 314 N.E.2d 438 (1974).

A bank which cashes a check drawn on another bank has a security interest and is a holder for value. Where the collecting bank had no actual knowledge that payment had been refused by another and nothing in drawer's past record would have put bank on notice of any infirmity in the check, bank was also holder in due course, since UCC § 3-302 test of notice is whether bank, from all the facts and circumstances of which it had actual knowledge at the time in question, acted as a reasonable commercial bank. *Suit & Wells Equip. Co. v. Citizens Nat'l Bank*, 263 Md. 133, 282 A.2d 109 (1971).

Because a bank pays value for the purposes of UCC § 3-302 holder in due course definition if it has a security interest in the item, a bank obtained a security interest in the plaintiff's check under UCC § 4-209 when it advanced \$5,000 in cash

on it. *Nida v. Michael*, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

Where a customer deposits a check with his bank and immediately writes his own check in the same amount with which latter check he pays a note he owes to the bank, the bank becomes the holder for value of the original check. *Waltham Citizens Nat'l Bank v. Flett*, 353 Mass. 696, 234 N.E.2d 739 (1968).

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

It would hinder commercial transactions if depositors banks refused to permit withdrawal prior to clearance of checks, and it is clear that the UCC was intended to permit this practice and to protect banks which have given credit on deposited items prior to notice of a stop payment order or other notice of dishonor. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

A bank accepting a negotiable instrument in satisfaction of an antecedent debt is a holder for value and in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

By including §§ 4-208(1)(a) and 4-209, the draftsmen of the Uniform Commercial Code approved the majority rule at common law and under the Negotiable Instruments Law that where a bank customer deposits checks in his account, and the

bank allows the customer to draw against the credit allowed for the checks, the bank is a holder in due course to the extent of

its advances. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

RESEARCH REFERENCES

ALR. Crediting proceeds of negotiable paper to holder's deposit account as constituting bank holder in due course. 59 A.L.R.2d 1173.

Am Jur. 10 Am. Jur. 2d, Banks §§ 860, 970.

11 Am. Jur. 2d, Bills and Notes §§ 207, 208, 274.

15A Am. Jur. 2d, Commercial Code § 8.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:141, 4:142 (Security interest of collecting bank in items; when bank gives value for purposes of holder in due course).

CJS. 9 C.J.S., Banks and Banking §§ 382 et seq., 408, 409, 411, 414.

§ 75-4-212. Presentment by notice of item not payable by, through, or at bank; liability of drawer or indorser.

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under Section 75-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under Section 75-3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

SOURCES: Formerly § 75-4-210: Codes, 1942, § 41A:4-210; Laws, 1966, ch. 316, § 4-210; Laws, 1992, ch. 420, § 94, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-210. Provisions formerly found in § 75-4-212 can now be found in § 75-4-214.

Cross References — Presentment and notice of dishonor, of commercial paper, generally, see § 75-3-501.

Collection of documentary drafts, see §§ 75-4-501, 75-4-502.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-210.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-210.

6. In general.

In a case in which it was held that the Negotiable Instruments Law did not abrogate the common-law rule that where an instrument was being collected by a bank on behalf of an indorsee, a written demand mailed by the bank to the maker of the instrument to pay the instrument at

the bank on the due date was sufficient to make the offices of the bank the place of payment, so that the neglect of the maker to pay the note at the bank amounted to a dishonor of the instrument, a physical exhibition of the note not being required, it was said that the instant section, al-

though not applicable to the case under consideration, would sanction the presentment procedure followed by the bank in the case under consideration. *Batchelder v. Granite Trust Co.*, 339 Mass. 20, 157 N.E.2d 540 (1959).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 980, 981.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:151-4:153 (Presentment to payor other than bank).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4-Bank Deposits and Collections, §§ 253:2291, 253:2292 (Presentment by notice of item not payable by, through, or at a bank).

§ 75-4-213. Medium and time of settlement by bank.

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by Federal Reserve regulations or circulars, clearinghouse rules, and the like, or agreement. In the absence of such prescription:

(1) The medium of settlement is cash or credit to an account in a Federal Reserve bank of or specified by the person to receive settlement; and

(2) The time of settlement is:

(i) With respect to tender of settlement by cash, a cashier's check, or teller's check, when the cash or check is sent or delivered;

(ii) With respect to tender of settlement by credit in an account in a Federal Reserve bank, when the credit is made;

(iii) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(iv) With respect to tender of settlement by a funds transfer, when payment is made pursuant to Section 75-4A-406(a) to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) or the time of settlement is not fixed by subsection (a), no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) Presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement,

settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

SOURCES: Formerly § 75-4-211: Codes, 1942, § 41A:4-211; Laws, 1966, ch. 316, § 4-211; Laws, 1992, ch. 420, § 95, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-211. Provisions formerly found in § 75-4-213 can now be found in § 75-4-215.

Cross References — Settlements by debits and credits in accounts between banks, see § 75-4-213.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-211.

A. Decisions Under Uniform Commercial Code.

6. In general.

B. Pre-Uniform Commercial Code Decisions.

7. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-211.

A. Decisions Under Uniform Commercial Code.

6. In general.

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established

proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

In action by plaintiff customer against depositary and collecting bank for wrongfully debiting plaintiff's checking account with amount of certain dishonored checks that had apparently been forged, where plaintiff introduced evidence which might indicate that bank had dishonored some or all of such checks after its midnight deadline for taking such action under UCC § 4-211(2) and giving notice of dishonor under UCC § 3-508(2), trial court's premature entry of judgment for bank at conclusion of direct and cross-examination of plaintiff's only witness deprived plaintiff of opportunity to establish prima facie case of proper deposit of such checks and improper debit thereof, so as to shift burden to bank of going forward and showing that it had acted within reasonable time in debiting plaintiff's account without the statutorily required notice within 24 hours following day of deposit. *Trading Assocs. v. Trust Co. Bank*, 142 Ga. App. 229, 235 S.E.2d 661 (1977).

Under UCC § 4-211(1), a collecting bank may, with legal safety, accept any one of the mentioned forms of remittance in settlement of items, but UCC § 4-211(1) was not designed to require a collecting bank to accept any one or all of the forms of remittance mentioned therein; hence, amendments to Federal Reserve Regulation J, making remittance specified in UCC § 4-211(1)(a) no longer available as means of settlement for checks cleared through Federal Reserve System was not in conflict with Code. *Community Bank v. Federal Reserve Bank*, 500 F.2d 282 (9th

Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

B. Pre-Uniform Commercial Code Decisions.

7. In general.

Duty of collecting bank to collect in money. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank cannot extend time of payment. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank held guilty of negligence and liable to payee for amount of check. *Bank of Shaw v. Ransom*, 112 Miss. 440, 73 So. 280 (1916).

Drawer is discharged where bank while solvent receives check for collection and charges it to him though it fails to pay over money to person from whom it was received. *Planters' Mercantile Co. v. Armour Packing Co.*, 109 Miss. 470, 69 So. 293 (1915); *Planters' Mercantile Co. v. Christian Peper Tobacco Co.*, 69 So. 295 (Miss. 1915); *Schloss & Rothschild v. Haupt*, 69 So. 295 (Miss. 1915).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 978, 981, 982, 986.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:161,

4:162 (Media of remittance; provisional and final settlement in remittance cases).

CJS. 9 C.J.S., Banks and Banking §§ 408, 409, 411, 414.

§ 75-4-214. Right of charge-back or refund; liability of collecting bank; return of item.

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depositary bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 75-4-301).

(d) The right to charge back is not affected by:

- (1) Previous use of a credit given for the item; or
- (2) Failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

SOURCES: Formerly § 75-4-212: Codes, 1942, § 41A:4-212; Laws, 1966, ch. 316, § 4-212; Laws, 1971, ch. 402, § 1; Laws, 1992, ch. 420, § 96, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-212. Provisions formerly found in § 75-4-214 can now be found in § 75-4-216.

Cross References — General obligation of good faith, see §§ 75-1-203, 75-4-103.

Satisfaction of promise or order to pay sum stated in foreign currency in commercial paper, see § 75-3-107.

Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

Settlement by means of remittance instrument or authorization to charge, when final, see § 75-4-213.

When settlement becomes final, generally, see § 75-4-215.

Deferred posting, see § 75-4-301.

Payor bank's liability to customer for wrongful dishonor of item, see § 75-4-402.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-212.

6. In general; refund of provisional credit.
7. Charge-back of credit.
8. —Proper notice of dishonor.
9. Charge-back by depositary bank.
10. Effect of charge-back.
11. Election of remedy.
12. Laches; delay in charge-back.
13. Practice and procedure.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-212.

6. In general; refund of provisional credit.

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft

for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

7. Charge-back of credit.

Where payee endorsed and deposited check in his account with bank, bank credited payee's account and forwarded check to foreign payor bank for payment, and payee withdrew full amount of deposit before dishonor of check by payor bank, payee remained owner of check and bank was agent for collection, so that credit given for deposit was only provisional settlement and risk of loss on check remained in payee as owner, and not upon agent bank; and bank's failure to make

formal protest was immaterial since payee's liability was based not on his endorsement of check but on his status as depositor and withdrawer of funds. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

Collection agent may charge back dishonored draft to account belonging to customer. *Manufacturers Nat'l Bank v. Sutherland*, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

If the collecting bank has credited its customer's account with an item, but fails to receive a final settlement for the item, it may charge back the customer's account; and similarly upon receiving notification by the drawee bank of a forged endorsement, the collecting bank may properly refund the amount to the drawee bank, and charge back the amount against the customer's account. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

8. —Proper notice of dishonor.

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorses, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Collecting bank which received customer's deposit of bank draft payable through another bank and sent it for collection could, on item's dishonor, revoke provisional settlement made on deposit of item and charge back amount of credit given customer's account or obtain refund from customer if bank returned item to customer or sent notification of "facts" to him, as required by UCC § 4-212(1). In such case, the "fact" that entitled bank to revoke provisional settlement and charge back or obtain refund from customer was fact of item's dishonor, and bank was under duty to give notice to customer by

bank's midnight deadline or within reasonable time after it learned fact of dishonor (stating that such interpretation of collecting bank's duty under UCC § 4-212(1) to give customer notice of dishonor was reinforced by UCC § 4-202(1)(b), which provides that collecting bank must use ordinary care in sending notice of dishonor to bank's transferor, and holding that such notice was given orally in instant case, as permitted by UCC § 3-508(3)). *Salem Nat'l Bank v. Chapman*, 64 Ill. App. 3d 625, 381 N.E.2d 741 (5th Dist. 1978).

Where (1) customer of branch bank of plaintiff bank deposited check payable to her in her checking account at branch bank on Monday, August 18, 1975, (2) check was promptly dishonored and returned by drawee bank to plaintiff bank on Tuesday, August 19, 1975, and (3) plaintiff bank did not send notice of such dishonor to branch bank until Monday, August 25, 1975, charge-back remedy under UCC § 4-212(1) was not available to plaintiff, even though branch bank is considered as separate bank for purpose of determining time limits under UCC Articles 3 and 4, since ordinary care required that plaintiff, by its midnight deadline on Wednesday, August 20, 1975, should have sent notice of check's dishonor to branch bank and that branch bank, in turn, should have sent notice of dishonor to defendant by branch bank's midnight deadline on Thursday, August 21, 1975, instead of giving notice to defendant on Monday, August 25, 1975. *Manufacturers Hanover Trust Co. v. Akpan*, 91 Misc. 2d 622 (1977).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depository bank where collecting bank gave depository bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor

to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. *Valley Bank & Trust Co. v. First Sec. Bank*, 538 P.2d 298 (Utah 1975).

Even if bank's settlement for check had been provisional, where bank conceded that it neither sent written notice of dishonor nor returned check before "midnight deadlines", bank had no right to charge item back to payee's account. *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969) (recognizing rule).

9. Charge-back by depository bank.

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depository bank from charging amount of item back to its depositor upon subsequent dishonor of check. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

10. Effect of charge-back.

Where customer deposited four checks drawn by defendant with plaintiff bank and bank credited customer's account, where bank then debited customer's account for amount of check written by customer, where defendant stopped payment on four checks and bank dishonored customer's check upon learning of customer's insolvency, and where bank exercised charge back rights by debiting customer's account for exact amount of four checks drawn by defendant, in action by bank against defendant for amount of four checks, bank was not entitled to recovery since bank had not given value for checks and was not a holder in due course within meaning of UCC § 4-208. Furthermore, bank's exercise of charge back rights under UCC § 4-212 made bank whole and recovery against defendant would permit double recovery in favor of bank. *GMAC v. Bank of Carroll County*, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

11. Election of remedy.

Bank was acting as both depository and collecting bank under UCC § 4-105 so as to have right under UCC § 4-212 to

charge payees' account or obtain refund for money advanced on basis of treasury bills, where treasury bills were dishonored after payees were allowed to overdraw their account by amount to be received for bills discounted and sold through normal market channels. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

12. Laches; delay in charge-back.

UCC § 4-212(5) does not provide that collecting bank can charge back item at any time after it has learned of facts, such as stop payment order, but means that once fact is known, bank must promptly exercise its right to charge back; collecting bank did not exercise its right of charge back promptly where it waited 29 days after it received notice that check had been dishonored before exercising right to charge back. *First State Bank & Trust Co. v. George*, 519 S.W.2d 198 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 11, 1975).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depository, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. *Isaacs v. Chartered New England Corp.*, 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Where corporate check, which was payable to plaintiff and was made out by her dying husband on corporate account, was deposited in her account in same bank on which check was drawn, and plaintiff's stepson, acting for corporation, stopped payment on check, but bank did not charge back and reverse plaintiff's provisional credit before midnight of banking day following receipt or send written notice until seven days later, plaintiff had absolute right to draw upon funds, and payment of item had become final by passage of time. However, bank was subro-

gated to corporate drawer's rights against plaintiff notwithstanding fact that bank never debited corporate account and fact that trial court granted summary judgment in favor of corporate drawer against bank, which was final and nonvacatable, thus preventing corporate drawer from suffering any loss. *Sunshine v. Bankers Trust Co.*, 34 N.Y.2d 404, 314 N.E.2d 860 (1974).

13. Practice and procedure.

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the de-

positor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of proving that the payee's indorsements had been forged. *Krinsky v. Pilgrim Trust Co.*, 337 Mass. 401, 149 N.E.2d 665 (1958).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 897, 937, 987, 988.

11 Am. Jur. 2d, Bills and Notes § 895.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:171-

4:174 (Media of remittance; right of chargeback or refund).

CJS. 9 C.J.S., Banks and Banking §§ 383, 402, 408, 409, 411, 414.

§ 75-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash;

(2) Settled for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement; or

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the

item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) If the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time;

(2) If the bank is both the depository bank and the payor bank, and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.

(f) Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

SOURCES: Formerly § 75-4-213: Codes, 1942, § 41A:4-213; Laws, 1966, ch. 316, § 4-213; Laws, 1992, ch. 420, § 97, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-213.

Cross References — Finality of payment or acceptance of commercial paper, see § 75-3-418.

Cutoff hour for handling of money and items, see § 75-4-107.

Duration of status of collecting bank as agent of owner, see § 75-4-201.

Settlement by means of remittance instrument or authorization to charge, see § 75-4-213.

Charge-back or refund with respect to provisional settlements, see § 75-4-214.

Final payment by payor bank as fixing preferential rights, see § 75-4-216.

Deferred posting, statutory right of payor bank to revoke settlement, see § 75-4-301.

Payor bank's accountability for late return of item presented on or received by it, see § 75-4-302.

Effect of receipt of notice, stop order, legal process, after final payment of item, see § 75-4-303.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-213.

6. In general.

7. "Accountable".

8. Payor bank's payment in cash.

9. —Completion of posting process.

10. —Delay in revoking provisional settlement.

11. Effect of payor bank's accountability.

12. Collecting bank's liability.

13. Withdrawal as of right; settlement of item.

14. Practice and procedure.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-213.

6. In general.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is

the “end of the line” in the collection process and the “turn-around” point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and set offs (UCC § 4-303(1)). It is the “end of the line” in the collection process and the “turn-around” point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Language of UCC § 4-213(1) is oriented to time of payment and not legal effect of payment. Phrase “finally paid” suggests act in particular sequence of acts that establishes time of payment, and word “when” refers only to time of payment. In other words, the statute does not deal with the problem of when is payment final so that bank cannot recover back money paid out; it deals only with the problem of when checks are paid for limited purposes. *Demos v. Lyons*, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

7. “Accountable”.

In construing UCC § 4-213(1)(a)-(d), the word “accountable,” which is not defined in the Uniform Commercial Code, does no more than put subdivision (b), (c), and (d) noncash payments on a par with subdivision (a) cash payments. The last sentence in UCC § 4-213(1), following subdivision (d), simply means that non-cash payments have the same legal effect as cash payments. However, it does not follow that the payor bank’s “accountability” as to (b), (c), and (d) payments should deprive the payor bank of its right to restitution as to any of such payments,

much less all of them. This, in turn, leads to the further conclusion that even if UCC § 4-213(1) is considered to be a rule of law, its silence as to common-law restitution cannot be read as abolishing such restitution. *Demos v. Lyons*, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

8. Payor bank’s payment in cash.

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer’s account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give “wire advice of nonpayment” before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depository-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff’s theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both “paying banks and collecting banks,” (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff’s theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice require-

ment, plaintiff had not been damaged. *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Plaintiff bank was not entitled to recover \$3,025 which defendant received as proceeds of cashier's check issued to defendant by bank where defendant used personal check of one of bank's customers in same amount as cashier's check as payment for cashier's check and where bank's customer subsequently stopped payment on his check; when bank accepted its customer's check as payment for cashier's check, customer's check was paid in cash without any reservation of right to revoke settlement under UCC § 4-213(1)(a) and (b); thus, bank erred to its own prejudice when it did not inform its customer that his stop payment order came too late under UCC § 4-303(1)(b), and in honoring stop payment order when it was received too late. *Citizens & S. Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

Where bank paid check in cash, it then made final payment and could not sue payees of check except for breach of warranty. *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969).

9. —Completion of posting process.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of *Price v. Neal* (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropri-

ating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank. *United States v. Pavloski*, 574 F.2d 933 (7th Cir. Wis. 1978) (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based).

Where bank had made final posting of check under UCC § 4-109 and then wrongfully reversed it, bank was liable to payee. *H. Schultz & Sons v. Bank of Suffolk County*, 439 F. Supp. 1137 (E.D.N.Y. 1977).

Collecting bank was entitled to recover amount of deficiency from drawee bank where drawee bank paid encoded amount of under-encoded check, notwithstanding drawer's instruction to drawee bank after cancelled check had been returned to drawer and after drawer was informed of encoding error that drawee was not to "bother" his account; since posting check constituted final payment within meaning of UCC § 4-213(1) and since drawee bank retained check under UCC § 4-302 past its midnight deadline without completely settling for it, drawee bank was liable for face amount of check and drawer lost right to stop payment thereon. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977).

In action by depository bank against payor bank to determine defendant's accountability to plaintiff on check, where (1) defendant's computer determined that there were insufficient funds in account of drawer of check and did not automatically debit such account, and (2) defendant's personnel examined check and computer's insufficient-funds printout, received advice to pay check notwithstanding lack of funds in drawer's account, physically marked check "paid," and charged draw-

er's account by processing check as overdraft, court held (1) that at time overdraft was created against drawer's account, defendant had decided to pay check and had recorded its decision, and (2) as a result, defendant under UCC § 4-213(1)(c) made final payment of check by completing process of posting and thus was accountable to plaintiff for amount of check. *North Carolina Nat'l Bank v. South Carolina Nat'l Bank*, 449 F. Supp. 616 (D.C.S.C. 1976), *aff'd*, 573 F.2d 1305 (4th Cir. S.C. 1978), *cert. denied*, 439 U.S. 985, 99 S. Ct. 577, 58 L. Ed. 2d 657 (1978).

Even though check was "improperly" paid by payor bank under UCC § 4-403, after bank received stop payment order from its customer, check was nonetheless "finally" paid under § 4-213 when customer's account was charged with item; when check was honored by payor bank, provisional settlement received by payee's bank for item became final and money became available for withdrawal by payee as matter of right. *Aljax Corp. v. Connecticut Mut. Life Ins. Co.*, 458 Pa. 57, 333 A.2d 469 (1974).

The process of posting is not completed by virtue of the fact that the drawee bank had verified the signature on the check, determined that the account was sufficient to pay for check, marked the check paid, and filed it in the customer's file for return to him. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

10. —Delay in revoking provisional settlement.

Whether a payor bank has finally paid an item depends on whether it has performed any of the affirmative acts defined in UCC § 4-213(1)(a)-(c). Where a payor bank does not act affirmatively under subsections (a)-(c), its inaction by failing to revoke a provisional settlement constitutes final payment under UCC § 4-213(1)(d). *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser,

after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Under UCC § 4-213(2), final payment of a check "firms up" all of the provisional settlements that have been made in the collection process. Under UCC § 4-213(1)(d) and Official Comment 6, a payor bank makes final payment of a check when it fails to revoke a provisional settlement in the time and manner permitted by statute, clearinghouse rule, or agreement. As to items not presented over the counter or by local clearinghouse, this means that a payor bank is deemed to have made final payment of a check when it fails to revoke a provisional settlement by its midnight deadline. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

11. Effect of payor bank's accountability.

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depository bank from charging amount of item back to its depositor upon subsequent dishonor of check. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

12. Collecting bank's liability.

With respect to rights of true owner of negotiable instrument which has been collected and payed on forged endorsement, money received by collecting bank and mingled with bank's funds is traceable by proper claimant into those funds; and so long as amount of cash on hand at bank is not diminished below amount of claimant's money that has been mingled with fund, defendant collecting banks must be deemed to retain proceeds of instruments transferred by forger, regardless of whether those instruments were cashed

or accepted for deposit. *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Once a final settlement has taken place, the collecting bank is no longer an agent, but has been credited with the proceeds of the item, and a debtor-creditor relationship with its customer ensues. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

13. Withdrawal as of right; settlement of item.

Where (1) bank pursuant to valid safekeeping receipt held United States treasury bonds belonging to union trust fund for collection, (2) such receipt provided that bank would act only as its depositor's collecting agent and that collected proceeds of bonds would be disbursed only according to directions of fund's trustees, (3) bank collected proceeds of bonds, but (4) trustees failed to give bank any directions for disbursing such proceeds, bank's agency relation terminated and its contractual obligations were fulfilled when, after collecting bonds' proceeds, it made proper payment thereof to trustees under UCC § 4-213(4)(a) by crediting amount of proceeds to union's trust account and such funds became available to trustees for withdrawal as of right. *Bieze v. Coca*, 54 Ill. App. 3d 7, 369 N.E.2d 106 (1st Dist. 1977).

Exception to rule that mere crediting of bank customer's account for deposited check does not constitute giving of value for such check occurs when the credit, under UCC § 4-208(1)(b), is "available for withdrawal as of right," even though the credit is not drawn on. Under UCC § 4-213(4)(a), a credit is "available for withdrawal as of right" within reasonable time after bank learns of final settlement in collection process of check for which credit was given. Until such final settlement, in absence of any agreement between bank and depositor, bank should not be viewed as having given value until there is final payment of credited check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

A bank incurred no liability in declining payment against uncollected drafts before settlement became final; refusal of the bank to pay these drafts did not constitute

wrongful dishonor. *Merchant v. Worley*, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

14. Practice and procedure.

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). *Rapp v. Dime Sav. Bank*, 64 A.D.2d 964 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

In action by payee bank against payor bank for wrongfully dishonoring check payable to plaintiff, summary judgment for defendant was proper where check never went through final steps in defendant's payment process, as indicated by fact that check did not have "paid" stamped across its face and back of check was stamped "drawn against uncollected funds." In such case, check was not finally paid under UCC § 4-213(1)(c), dealing with completing process of posting item to drawer's account, and defendant was not liable to plaintiff for amount of check. *Barnett Bank v. Capital City First Nat'l Bank*, 348 So. 2d 643 (Fla. App. 1977).

In suit by bank against stakeholder of seller and buyer, where (1) buyer gave stakeholder check for \$25,000 to hold as deposit on buyer's purchase of restaurant from seller, (2) bank paid such check even though doing so created \$9,600 overdraft against buyer's account, and (3) bank was aware that payment of check would create such overdraft, bank assumed risk that buyer would not cover check and thus waived any claim of a mistaken belief that buyer had covered it. Accordingly, bank was not entitled to recover amount of overdraft from stakeholder even though UCC § 4-213(1) did not diminish payor bank's common-law right of restitution.

Demos v. Lyons, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

In suit by plaintiff customer against bank to recover amount of check allegedly paid by bank in defiance of plaintiff's stop-payment order, where check was initially presented to and paid by bank on January 9, 1975; where plaintiff later complained to bank that check had improper indorsement, and bank on June 24, 1975 notified plaintiff that its account had been reccredited with amount of check and that bank had placed stop-payment order on check; where bank also sent plaintiff stop-payment order form which plaintiff duly executed and returned to bank on June 26, 1975; where plaintiff on December 5, 1975 wrote bank that stop-payment order was still in effect; and where bank on January 2, 1976, again received same check for payment, paid it despite fact that this time it had different indorsement (that of named payee), and redebited plaintiff's account with amount of check, trial court's judgment that stop-payment order was still in effect when bank paid check second time and that such payment was error would be affirmed because (1) nothing in record suggest any irregularity or misconstruction by bank with respect to such stop-payment order and its purpose; and (2) defendant's contention that check had been "finally paid" under UCC § 4-213(1)(b) and (c) and UCC § 4-303(1)(c) and (d) on January 9, 1975, and that such "final payment" had priority over plaintiff's subsequent stop-payment order, could not be sustained, since such stop-payment order related not to payment made on January 9, 1975, but to payment made on January 2, 1976. In such case, it was incongruous for bank to contend that it could rightfully pay check again because it had already "finally paid" it. *Trust Co. v. Student Air Travel Agency, Inc.*, 142 Ga. App. 248, 235 S.E.2d 670 (1977).

Where bank, which was both payor bank and depositary bank as to two checks representing estate funds which were deposited by payee in payee's checking account with bank, had only reserved under payee's deposit contract right to charge back any item before final payment, and where bank did not attempt to

recover estate funds represented by such checks until nine days after bank had received checks, final payment of such checks had already occurred under UCC § 4-213(1)(d) before bank attempted to recover such funds. However, in payee's suit against bank under UCC § 4-402 for dishonoring checks written by payee against his account after the two checks representing estate funds in issue had been deposited in payee's account, court would reverse summary judgment for bank and remand cause for new trial on issue of bad faith of payee in participating in deposit of such funds in payee's account in violation of court decree in estate proceeding. *Bartlett v. Bank of Carroll*, 218 Va. 240, 237 S.E.2d 115 (1977) (observing that UCC Art 4 neither specifically contemplates nor excludes recovery by bank after final payment of item when person receiving the credit has acted in bad faith).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warrants of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

After final settlement, and the charging of the amount of the check against the drawer's account, a voluntary refund by the collecting bank is at its own peril, for there are defenses it could interpose to resist payment. *622 West 113th St. Corp. v. Chemical Bank New York Trust Co.*, 52 Misc. 2d 444 (1966).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of

proving that the payee's indorsements had been forged. *Krinsky v. Pilgrim Trust Co.*, 337 Mass. 401, 149 N.E.2d 665 (1958).

RESEARCH REFERENCES

<p>ALR. What constitutes final payment under UCC § 4-213. 23 A.L.R.4th 203.</p> <p>Am Jur. 10 Am. Jur. 2d, Banks §§ 770, 779-781.</p> <p>11 Am. Jur. 2d, Banks §§ 970-975, 978, 981 et seq., 987, 988.</p>	<p>6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:181-4:184 (Media of remittance; final payment of item by payor bank).</p> <p>CJS. 9 C.J.S., Banks and Banking §§ 393, 397, 398, 405.</p>
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§ 75-4-216. Insolvency and preference.

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(c) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank.

SOURCES: Formerly § 75-4-214: Codes, 1942, § 41A:4-214; Laws, 1966, ch. 316, § 4-214; Laws, 1992, ch. 420, § 98, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-214.

Cross References — Provisions of code as severable in event any provision or clause or application thereof held invalid, see § 75-1-108.

Settlement by means of remittance instrument or authorization to charge, see § 75-4-213.

Settlement with right to revoke, provisional settlement between presenting and payor banks, see § 75-4-215.

Regulation of insolvent banks, generally, see §§ 81-9-1 et seq.

JUDICIAL DECISIONS

1. In general.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that

determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is the "end of the line" in the collection

process and the “turn-around” point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Colorado Nat’l Bank v. First Nat’l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and setoffs (UCC § 4-303(1)). It is the “end of the line” in the collection process and the “turn-around” point that commences the return

flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Although doubt may exist as to the validity of this section in providing for preferences in the event of the insolvency of a bank, the severability provisions of the UCC would leave unaffected the validity of § 4-302 which fixes the payor’s responsibility for late return of an item. *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

RESEARCH REFERENCES

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| <p>Am Jur. 10 Am. Jur. 2d, Banks § 863.
 11 Am. Jur. 2d, Banks § 990.
 6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:191-</p> | <p>4:193 (Media of remittance; insolvency and preference).
 CJS. 9 C.J.S., Banks and Banking §§ 173, 174, 204-208, 219, 282, 405.</p> |
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PART 3.

COLLECTION OF ITEMS: PAYOR BANKS.

SEC.

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| <p>75-4-301.
 75-4-302.
 75-4-303.</p> | <p>Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.
 Payor bank’s responsibility for late return of item.
 When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.</p> |
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§ 75-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) Returns the item; or

(2) Sends written notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a).

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) As to an item presented through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with clearinghouse rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

SOURCES: Codes, 1942, § 41A:4-301; Laws, 1966, ch. 316, § 4-301; Laws, 1992, ch. 420, § 99, eff from and after January 1, 1993.

Cross References — When item has been finally paid by payor bank, see § 75-4-215.

Payor bank's accountability for late return of item presented on or received by it, see § 75-4-302.

JUDICIAL DECISIONS

1. In general.

Under UCC § 4-301(1)(a), the payor bank, in order to revoke a provisional settlement for an item, must return the item before the bank has made final payment and before its midnight deadline. *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

In action by bank against customer to recover overdraft created when bank charged back amount of dishonored check to customer's account, where (1) check in suit, which was drawn by corporation on its account with plaintiff's Wilmington branch and made payable to defendant, was presented by defendant on Friday, March 18, 1977, at Wilmington branch, after its cutoff hour, for deposit in defendant's account with plaintiff's High Point branch, thereby making check legally presented on Monday, March 21, 1977, (2) check was processed at plaintiff's eastern operations center on March 21, 1977, and processing included wiring deposit to plaintiff's western operations center for provisional credit to defendant's account with High Point branch and debiting of drawer's account at eastern operations center for amount of check, (3) on March 22, 1977, plaintiff's "Transactions not Posted Report" listed check as nonposted

because of insufficient funds, and it was returned on same day to plaintiff's western operations center for charge-back to defendant's account, (4) on March 23, 1977, western operations center received check, charged it back to defendant's account, and mailed it, along with notice of its dishonor, to defendant, and (5) defendant in the meantime had written check on his account, with result that charge-back created overdraft as to which defendant refused to reimburse plaintiff, court held (1) that under UCC § 4-106, dealing with treatment of branch bank as separate bank for purpose of computing time within which, and place at which, action may be taken or notices given under the code, both High Point and Wilmington branches of plaintiff bank were entitled to separate bank status, (2) that since Wilmington branch was payor bank in the transaction, before it could revoke any provisional settlement, it had to comply with UCC § 4-301(4)(b), which provides that an item is "returned" when it is sent or delivered to the bank's transferor, (3) that since defendant had presented check for deposit in his High Point account, that branch was both collecting bank and transferor of check for collection and thus entitled to its return or notice of its dishonor, (4) that payor bank (Wilmington branch) had preserved its right to revoke

provisional settlement for check by returning it to collecting bank (High Point branch) before payor bank had made final payment and before its midnight deadline, as required by UCC § 4-301(1)(a), and (5) that since collecting bank (High Point branch), which had given defendant provisional settlement for check, received returned check for charge-back on March 23, 1977, and mailed both check and notice of its dishonor to defendant on same day, it acted well within its midnight deadline under UCC § 4-212(1) and, having received no final settlement on check, was entitled to charge it back against defendant's account to cover overdraft. *North Carolina Nat'l Bank v. Harwell*, 38 N.C.App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depository-collecting bank for face amount of such checks because payor bank, which conceded had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with account-

ability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

If a payor bank fails to take the action required by UCC § 4-301(1) within the time limits prescribed therein, it is accountable for the amount of the item under UCC § 4-302(a) if it retains the item beyond midnight of the banking day of receipt without settling for the item or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Where (1) absconding horse trainer, after establishing checking account with defendant bank, obtained arrangement with defendant under which he was allowed to cover his checks as presented on a daily basis and thereafter covered with cash deposits all of his overdrafts up to December 20, 1973, (2) plaintiff racetrack cashed 29 checks drawn by trainer prior to to his

absconding and presented such checks for payment to defendant between December 20, 1973 and January 3, 1974, (3) defendant became uneasy on January 2, 1974 about trainer's failure to cover checks on daily basis and returned all 29 checks, each inscribed "Refer to maker," to federal reserve bank on January 4, 1974, and (4) 20 of such checks had been presented prior to January 3, 1974, while nine were presented on January 3, 1974, defendant was liable under UCC § 4-301(1)(a) and § 4-302(a) to plaintiff racetrack for balance due on the 20 checks that had been presented to defendant before January 3, 1974 because of defendant's failure to return such items by its midnight deadline. However, defendant was not liable under any legal theory, regardless of its deviation from good banking practices in handling trainer's account, for the nine checks that had been returned before expiration of defendant's midnight deadline, since defendant's duty to payees or holders of such checks was limited to compliance only with Uniform Commercial Code requirements pertaining to dishonor and return of bad checks. *Pennsylvania Nat'l Turf Club, Inc. v. Bank of W. Jersey*, 158 N.J. Super. 196, 385 A.2d 932 (App. Div. 1978), certification denied, 77 N.J. 506, 391 A.2d 520 (1978).

Payor bank which did not return before its midnight deadline check that was represented to it for payment, after such check had previously been dishonored by payor bank for insufficient funds, was not excused by UCC § 3-511(4) for not meeting midnight deadline because excuse rule of UCC § 3-511(4) applies only to time items, such as drafts, which has been dishonored by nonacceptance, and does not apply to demand items, such as checks, which have been dishonored by nonpayment. Furthermore, since check was not being held for protest, payor bank under UCC § 4-301(1) could revoke provisional settlement for check only by returning it before bank's midnight deadline and not by giving notice of check's dishonor. Therefore, even assuming that further notice of dishonor when check was re-presented was necessary to make drawer liable on check or to revive drawer's liabil-

ity on underlying contract of sale, provisions of UCC § 3-511(4) excusing notice of dishonor could not apply because notice of dishonor was not available to payor bank as means of revoking its provisional settlement for check. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

UCC § 4-302 defines extent of payor bank's liability for failure to meet its midnight deadline. Whether or not payor bank has met its midnight deadline, however, is determined by UCC § 4-301, not UCC § 4-302. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Under UCC § 4-301(1), written notice of dishonor of a check is a permissible method of revoking a provisional settlement for the check only if the check is either unavailable for return or is being held for protest. In all other cases, the check itself must be returned. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Uniform Commercial Code, like former Model Deferred Posting Statute, seeks to decrease, rather than increase, risk of liability to payor banks. By permitting deferred posting under UCC § 4-301(1), Uniform Commercial Code extends time within which payor bank must determine whether it will pay check drawn on bank. UCC § 4-301(1) does not require payor bank to act on day of receipt of check or within 24 hours of its receipt; instead, payor bank need not take action until midnight of next business day following business day on which it received check. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Under UCC § 4-301(1), payor bank may revoke provisional settlement for check if it takes such action before its midnight deadline, which is midnight of next banking day following banking day on which it received check. However, under UCC § 4-302(a), if payor bank misses its midnight deadline, it is accountable for face amount of check. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Payor bank which failed to dishonor and return check before its midnight deadline was liable for amount of check under UCC

§ 4-301(1)(b) and UCC § 4-302(a). *Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y.*, 59 A.D.2d 645 (4th Dep't 1977).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. *Berman v. United States Nat'l Bank*, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

In prosecution for drawing check against insufficient funds with intent to defraud, bank was at liberty to disclose records of defendant's account, where, under UCC §§ 4-301 and 4-302, defendant's act of drawing check on account which had been closed for over one year subjected bank to potential liability for amount of check, and where, therefore, defendant had no overriding expectation of privacy with respect to bank records relating to status of his account. *People v. Johnson*, 53 Cal. App. 3d 394 (3d Dist. 1975).

Subpoena duces tecum served on bank directing it to turn over to government certain checks that had been stolen in robbery would not be enforced where, under UCC § 4-301(1), bank was required to return check prior to its midnight deadline if it intended to dishonor check and where, under UCC § 4-302, bank could be held liable for face amount of check if it failed to act promptly and consistently with such requirements. *United States v. Loskocinski*, 403 F. Supp. 75 (E.D.N.Y. 1975) (applying New York law).

A triable issue of fact as to whether a check described in plaintiff's cause of action was dishonored or returned during the period ending at midnight of the bank's business day next following the day of receipt of the check for deposit precluded granting defendant's motion for summary judgment. *Jacobson v. First Nat'l City Bank*, 29 A.D.2d 514 (1st Dep't 1967).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. *Community Bank v. Federal Reserve Bank*, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 859 et seq.

11 Am. Jur. 2d, Banks §§ 970-997.

11 Am. Jur. 2d, Bills and Notes §§ 351-360.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:201-4:205 (Collection of items; payor banks; deferred posting).

CJS. 9 C.J.S., Banks and Banking

§§ 278, 328, 329, 330, 337, 341, 349, 356, 393, 398.

§ 75-4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) Any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) is subject to defenses based on breach of a presentment warranty (Section 75-4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

SOURCES: Codes, 1942, § 41A:4-302; Laws, 1966, ch. 316, § 4-302; Laws, 1992, ch. 420, § 100, eff from and after January 1, 1993.

Cross References — Effect of this section on liability of “obligated bank” to claimant, see § 75-3-312.

Time limits within which payor bank must act, see § 75-4-301.

JUDICIAL DECISIONS

1. In general; relationship to other code sections.
2. Payor bank.
3. “Midnight deadline”.
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5. —Documentary drafts.
6. —Proper notice of dishonor.
7. Effect of late return.
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1. In general; relationship to other code sections.

The policy behind UCC § 4-302 is to reduce “float” and encourage the prompt return of dishonored checks, so that there will be a minimum of sand in the wheels of the bank collection system as it processes millions of items each day. *Idah-Best, Inc.*

v. First Sec. Bank, 99 Idaho 517, 584 P.2d 1242 (1978).

Under UCC § 4-301(1), payor bank may revoke provisional settlement for check if it takes such action before its midnight deadline, which is midnight of next banking day following banking day on which it received check. However, under UCC § 4-302(a), if payor bank misses its midnight deadline, it is accountable for face amount of check. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

UCC § 4-302 defines extent of payor bank's liability for failure to meet its midnight deadline. Whether or not payor bank has met its midnight deadline, however, is determined by UCC § 4-301, not UCC § 4-302. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. *Community Bank v. Federal Reserve Bank*, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

2. Payor bank.

New York bank was not payor bank or drawee of drafts drawn by plaintiff and forwarded to New York bank for collection, and, thus, was not liable under UCC § 4-302 for retaining drafts beyond prescribed time limits where names of both bank and its customer were included in space used for name of drawee, where transmittal letters from forwarding banks stated that customer was "payer" of draft or that it was drawn on customer, and where, since customer never authorized bank to make payments out of its account on drawer's order, there was no account out of which drawer could order bank to make payment. *Wilhelm Foods, Inc. v. National*

Bank of N. Am., 382 F. Supp. 605 (S.D.N.Y. 1974) (applying New York law).

3. "Midnight deadline".

In action by payee of check drawn on, and dishonored by, defendant Hailey branch of First Security Bank of Idaho, in which payee alleged that defendant had failed to return check or give notice of its dishonor before defendant's midnight deadline, where (1) payee deposited check on Friday, October 31, 1975, in its account with Twin Falls bank (not a part of First Security Bank of Idaho) and received provisional credit for such deposit, (2) Twin Falls bank, acting as payee's agent for collection, mailed check on Monday, November 3, 1975, to Boise branch of First Security Bank of Idaho for deposit in its commercial check-clearing account with Boise branch and received provisional credit for such deposit, (3) check arrived at Boise branch on Tuesday, November 4, 1975, and was sent to First Security Bank's data processing center, which was located in basement of First Security's Boise branch and performed numerous functions for both the Boise and Hailey branches, (4) on night of November 4, 1975, name of bank on which check was drawn and check's account number were sent to First Security Bank's computer at Salt Lake City, Utah, which informed data processing center at Boise branch that check's account contained insufficient funds to pay check, (5) on Wednesday, November 5, 1975, Boise branch sent check to defendant Hailey branch, (6) on Thursday, November 6, 1975, Hailey branch dishonored check, stamped "refer to maker" on it, and returned it to Boise branch with a clearings letter that effected reversal of provisional credit previously given to Boise branch and provisional debit given to defendant Hailey branch, (7) on Monday, November 10, 1975, Boise branch debited Twin Falls bank's account at Boise branch for check's amount and sent check to Twin Falls bank, (8) on Wednesday, November 12, 1975, Twin Falls bank received check and sent payee notice of dishonor on following day, and (9) payee received such notice on Friday, November 14, 1975, more than two weeks after check's deposit was made,

court held (1) that trial court had erred in ruling that for purposes of UCC § 4-302(a), dealing with payor bank's liability for late return of demand item, arrival of check at First Security Bank's data processing center constituted "presentment on" and "receipt by" defendant Hailey branch of such check, so as to cause Hailey branch's midnight deadline to begin to run from time of check's arrival at data processing center, (2) that although data processing center performed some routine accounting steps for both Boise and Hailey branches, this did not destroy the essential character of the transaction, namely, that Boise branch had acted as collecting and presenting bank for item that only Hailey branch could pay, (3) that under UCC § 4-106, separate status of a branch bank is to be respected in computing its midnight deadline, even though some of the branch's duties are performed outside the branch, (4) that nothing in the record showed that the data processing center had had any authority to receive presentment of check in suit or any means of ascertaining check's genuineness and sufficiency of drawer's funds to pay it, (5) that check's presentment on payor bank therefore occurred when check physically arrived at defendant Hailey branch with indorsements of all prior transferors, including that of the Boise branch, and not when it arrived at data processing center in the Boise branch, and (6) that as a result, defendant Hailey branch's midnight deadline had to be calculated from time check was physically presented to and received by it (remanding case for further proceedings, including ruling as to whether defendant Hailey branch had settled for check within time prescribed by UCC § 4-302(a)). *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

Where items accompanying drafts signed by maker were expressly delivered to payor bank against payment, items were "documentary drafts" and as such were exempt from midnight deadline of UCC § 4-302. *Wiley v. Peoples Bank & Trust Co.*, 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

"Midnight deadline" prescribed by this section is defined within Code § 4-104(h)

as midnight on next banking day following banking day on which item was received. *Farmers Coop. Livestock Mkt. v. Second Nat'l Bank of London*, 427 S.W.2d 247 (Ky. 1968).

4. Liability for late return.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) \$_____", and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee—and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. *Horney v. Covington County Bank*, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight dead-

line, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depository-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Where (1) absconding horse trainer, after establishing checking account with defendant bank, obtained arrangement with defendant under which he was allowed to cover his checks as presented on a daily basis and thereafter covered with cash deposits all of his overdrafts up to December 20, 1973, (2) plaintiff racetrack cashed 29 checks drawn by trainer prior to to his absconding and presented such checks for payment to defendant between December 20, 1973 and January 3, 1974, (3) defendant became uneasy on January 2, 1974

about trainer's failure to cover checks on daily basis and returned all 29 checks, each inscribed "Refer to maker," to federal reserve bank on January 4, 1974, and (4) 20 of such checks had been presented prior to January 3, 1974, while nine were presented on January 3, 1974, defendant was liable under UCC § 4-301(1)(a) and § 4-302(a) to plaintiff racetrack for balance due on the 20 checks that had been presented to defendant before January 3, 1974 because of defendant's failure to return such items by its midnight deadline. However, defendant was not liable under any legal theory, regardless of its deviation from good banking practices in handling trainer's account, for the nine checks that had been returned before expiration of defendant's midnight deadline, since defendant's duty to payees or holders of such checks was limited to compliance only with Uniform Commercial Code requirements pertaining to dishonor and return of bad checks. *Pennsylvania Nat'l Turf Club, Inc. v. Bank of W. Jersey*, 158 N.J. Super. 196, 385 A.2d 932 (App. Div. 1978), certification denied, 77 N.J. 506, 391 A.2d 520 (1978).

Payor bank which failed to dishonor and return check before its midnight deadline was liable for amount of check under UCC § 4-301(1)(b) and UCC § 4-302(a). *Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y.*, 59 A.D.2d 645 (4th Dep't 1977).

Where (1) bank customer tendered check to teller for deposit, (2) teller, instead of accepting check, told customer to take it to desk of bank vice president, (3) bank vice president accepted check and told another bank employee to put it in for collection and give customer receipt for it, and (4) employee complied with such order, bank in action for breach of its duty to act on check by bank's midnight deadline, could not successfully claim that teller had "returned" check to customer within meaning of UCC § 4-302(a), since teller did not "receive" check within meaning of UCC § 4-302, but simply postponed its receipt until customer took check to bank's vice president who accepted it for collection. *Available Iron & Metal Co. v. First Nat'l Bank*, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Payor bank became accountable for amount of item when it retained it beyond midnight of June 23, 1973, where item was received June 22, 1973, and not returned till June 28, 1973, despite fact that bank had received stop payment order from item's maker on May 15, 1973, and where bank admitted that item in question was "a demand item other than a documentary draft," thus bringing it squarely within provisions of UCC § 4-302. *Templeton v. First Nat'l Bank*, 47 Ill. App. 3d 443, 362 N.E.2d 33 (5th Dist. 1977).

Collecting bank was entitled to recover amount of deficiency from drawee bank where drawee bank paid encoded amount of under-encoded check, notwithstanding drawer's instruction to drawee bank after cancelled check had been returned to drawer and after drawer was informed of encoding error that drawee was not to "bother" his account; since posting check constituted final payment within meaning of UCC § 4-213(1) and since drawee bank retained check under UCC § 4-302 past its midnight deadline without completely settling for it, drawee bank was liable for face amount of check and drawer lost right to stop payment thereon. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. *Berman v. United States Nat'l Bank*, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

Where checks were sent directly by mail to payor bank, accompanied by instruction requesting immediate return if not paid, and payor bank held checks without paying, returning, or notifying collecting

bank of dishonor until collecting bank sent tracer which was returned almost one week later by payor bank, payor bank was accountable for unpaid balance of checks under UCC § 4-302(a). *Kane v. American Nat'l Bank & Trust Co.*, 21 Ill. App. 3d 1046, 316 N.E.2d 177 (2d Dist. 1974).

There appearing no valid defense, payor bank became liable to plaintiff-holder for amount of two checks received by defendant by reason of its retention of said items beyond statutory deadline without having either settled for or paid them, or, in alternative, returned them or sent notice of dishonor, prior to deadline; court did not err in judgment denying payor bank's motion for summary judgment. *National City Bank v. Motor Contract Co.*, 119 Ga. App. 208, 166 S.E.2d 742 (1969).

5. —Documentary drafts.

Bill of sale draft which was given in payment for cattle and which specifically provided that drawee-bank, at its option, could refuse to honor it unless bill of sale was properly filled out, was a "documentary draft" under UCC § 5-103, since instrument on its face specifically provided that condition of honor was bill of sale attached to draft as document of title to described cattle; therefore, drawee-bank was not liable for failure to pay or return item or send notice of dishonor prior to its midnight deadline since under UCC § 5-112 it could defer honor until close of third banking day following receipt of document at which time presenter of draft consented to bank holding draft for future payment. *Marfa Nat'l Bank v. Powell*, 512 S.W.2d 356 (Tex. Civ. App. 1974), *ref. n.r.e* (Dec. 4, 1974).

6. —Proper notice of dishonor.

If a payor bank fails to take the action required by UCC § 4-301(1) within the time limits prescribed therein, it is accountable for the amount of the item under UCC § 4-302(a) if it retains the item beyond midnight of the banking day of receipt without settling for the item or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp.

1366 (W.D. Mich. 1978) (construing Michigan UCC).

Oral notice of dishonor is not sufficient to establish compliance with UCC § 4-302(a). Only written notice of dishonor will suffice, since UCC § 4-302(a) requires that notice of dishonor must be "sent." *Available Iron & Metal Co. v. First Nat'l Bank*, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. *Sun River Cattle Co. v. Miners Bank*, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

Failure to give notice of dishonor within the statutory period imposed by UCC § 4-302 nails down the liability irrespective of whether or not the item would have been properly payable. *Central Bank & Trust Co. v. First Northwest Bank*, 332 F. Supp. 1166 (E.D. Mo. 1971), *aff'd*, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

7. Effect of late return.

In action by payee of check against payor bank, where (1) payee on October 21, 1976 deposited check in its account with collecting bank, (2) collecting bank

forwarded check to defendant, which received it on Friday, October 22, 1976 and returned it for insufficient funds on Monday, October 25, 1976, (3) defendant on November 4, 1976 instructed payee to redeposit check, (4) on such redeposit defendant, after receiving check, held it until November 16, 1976, and then returned it again for insufficient funds, (5) in intervening period, drawer of check had made assignment for benefit of creditors, and payee received no payment on instrument, (6) payee sued to recover amount of check under UCC § 4-302(a), dealing with late return of items, and alleged that defendant had prevented it from taking other means to protect itself, and (7) defendant claimed that when payee's bank forwarded once-dishonored check with covering letter that instructed defendant to remit its cashier's check when item was paid, defendant was thus directed to hold check as long as practicable without regard to defendant's midnight deadline, court held that agreement between two banks, based upon customs and practices of banking community, whereby payor bank, upon instruction of depository bank, holds possible worthless check until sufficient funds are deposited to cover same, acts as reasonable suspension of midnight deadline, thus relieving payor bank of liability to payee under UCC § 4-302(a). *David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor

bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depository bank from charging amount of item back to its depositor upon subsequent dishonor of check. *Mercantile Bank & Trust Co. v. Hunter*, 31 Colo. App. 200, 501 P.2d 486 (1972).

Where a payor bank does not return a check by the midnight deadline, payment of the check occurs by operation of UCC § 4-302. *First Nat'l Bank v. National Bank*, 491 P.2d 294 (Okla. 1971).

8. Defense; settlement.

Where agreement between Federal Reserve Bank and defendant bank achieved a method of provisional settlement which eliminated necessity of any formal action on part of defendant payor bank except to protest, prior to midnight deadline, in event items were not acceptable, such prior authorization was functional equivalent of provisional settlement; and having

sent in approved form of notice of dishonor of insufficient fund checks prior to its midnight deadline, defendant bank was not liable to plaintiff payee under Missouri Code section pertaining to late return of items. *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973).

9. Excuse.

A payor bank is not liable to the payee for retaining a check previously returned for insufficient funds beyond its "midnight deadline" when it does so upon instruction of the depository bank pursuant to an agreement concordant with a practice among banks for a payor to hold a previously dishonored item long enough to provide an opportunity for sufficient funds to be deposited by the drawer to meet the check, despite the fact that subdivision (a) of section 4-302 of the Uniform Commercial Code provides that if an item is presented on and received by a payor bank the bank is accountable for the amount of a demand item if the bank retains the item beyond midnight of the bank day of receipt without settling for it or does not pay or return the item or send notice of dishonor until after its midnight deadline, since the requirements of the Uniform Commercial Code can be modified by agreement to conform them with commercial usage, and since the payee's presentment of the check to its bank created a principal-agent relationship constituting an assent to the bank's dealing with the check in the manner customary in the banking industry; moreover, it was not unreasonable for the depository bank to take a possibly worthless instrument and direct the payor bank to adopt a technique that might provide the only chance for collection. *David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. *Goodman v. Norman Bank of Commerce*, 551 P.2d 661 (Okla. Ct. App. 1976).

10. Practice and procedure.

Subpoena duces tecum served on bank directing it to turn over to government certain checks that had been stolen in robbery would not be enforced where, under UCC § 4-301(1), bank was required to return check prior to its midnight deadline if it intended to dishonor check and where, under UCC § 4-302, bank could be held liable for face amount of check if it failed to act promptly and consistently with such requirements. *United States v. Loskocinski*, 403 F. Supp. 75 (E.D.N.Y. 1975) (applying New York law).

In prosecution for drawing check against insufficient funds with intent to defraud, bank was at liberty to disclose records of defendant's account, where, under UCC §§ 4-301 and 4-302, defendant's act of drawing check on account which had been closed for over one year subjected bank to potential liability for amount of check, and where, therefore, defendant had no overriding expectation of privacy with respect to bank records relating to status of his account. *People v. Johnson*, 53 Cal. App. 3d 394 (3d Dist. 1975).

Circumstance that defendant bank's remittance letter returning check and giving notice of dishonor, although dated January 27, was not stamped by Federal Reserve Bank until January 28, did not establish that bank failed to meet its statutory midnight deadline. *Conn v. Bank of Clarendon Hills*, 53 Ill. 2d 33, 289 N.E.2d 425 (1972).

Although a bank is liable to its customer for "wrongful dishonor" under the Uniform Commercial Code, it is forbidden under CPLR 5222 to honor withdrawals from an account specified in a restraining notice except pursuant to court order, and since a bank is thus restrained under a statute subsequent to the one creating a liability to its customer, any question of liability should yield to the consideration that the temporary dishonor of a customer's checks after service of a restraining notice cannot be said to be wrongful. *Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co.*, 47 Misc. 2d 741 (1965), *aff'd*, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

11. —Damages, attorney's fees.

In action under UCC § 4-302 for payor

bank's failure to meet its midnight deadline for accepting or dishonoring check presented to and received by it, on proof of failure to meet such deadline payor bank is liable for amount of check, regardless of whether check was properly payable to begin with or whether any actual damages were shown. *Goodman v. Norman Bank of Commerce*, 565 P.2d 372 (Okla. 1977).

Action based on payor bank's liability under UCC § 4-302 for failure to meet its midnight deadline for accepting or dishonoring check is action based on bank's mis-handling of check and not suit on instrument itself. Thus, where bank prevailed in action brought under UCC § 4-302 for bank's alleged failure to meet midnight deadline for acting on check, bank could not recover attorney's fee under non-UCC statute providing that in any action to recover on negotiable instrument, prevailing party should be allowed reasonable attorney's fee. *Goodman v. Norman Bank of Commerce*, 565 P.2d 372 (Okla. 1977).

Payor bank which held after their presentment for payment seven documentary sight drafts for periods varying from two to eighteen days without paying drafts or returning them to collecting bank, in intentional violation of collecting bank's instructions not to hold drafts after maturity or for convenience of payor bank's customer, was liable for face amount of drafts under (1) theory of conversion of drafts under UCC § 3-419(1) or (2) theory that payor bank had violated UCC § 4-302(b) by not paying drafts, which were properly payable, or seasonably returning them after expiration of payor bank's midnight deadline. *New Ulm State Bank v. Brown*, 558 S.W.2d 20 (Tex. Civ. App. 1977) (holding that since Uniform Commercial Code provided measure of recovery for both conversion of drafts and their late return, no basis existed for imposing consequential damages for payor bank's bad faith in making late return of drafts).

When payor bank fails to return check by bank's midnight deadline, it is liable for face amount of check under UCC § 4-302, and its liability is not governed by UCC § 4-103(5), which provides that general measure of damages for failure to

exercise ordinary care in handling an item is the amount of the item, less any amount which could not have been realized even by the exercise of ordinary care. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977) (stating that there is a rational basis for imposing liability on payor banks that differs from the liability imposed on collecting banks, that payor bank is only bank in the collection process that is in a position to know the actual state of the drawer's account, and that it is also the only bank in the collection process that can actually pay the check).

Where checks were dishonored but were not returned within time limits prescribed by UCC § 4-302, payor bank was liable to payees for face amount of checks less any payments received with respect thereto, notwithstanding payor bank's claim that due to short period of time between dishonor and drawer's bankruptcy, payees would have been unable, assuming timely return, to have obtained judgment against drawer, or even assuming payment, payees would not have been able to retain monies received since payment would represent voidable preference as against drawer's other creditors. Furthermore, payor bank failed to establish any right of subrogation under UCC § 4-407 and, thus, was not entitled to assert against payees any claims which might exist in favor of drawer of checks. *Met Frozen Food Corp. v. National Bank of N. Am.*, 89 Misc. 2d 1033 (1977).

Payor bank which did not pay or return check and did not send notice of dishonor until after midnight deadline was liable to payee for full amount of check; however, bank was apparently entitled to subrogation under UCC § 4-407. *AH-RS Coal*

Corp. v. Farmers Nat'l Bank, 63 Pa. D. & C.2d 203 (1973).

In suit by holder of drafts against drawee bank seeking to recover on drafts based on bank's delay in returning drafts until after midnight deadline following second presentment, UCC § 4-302 was held to create a liability independent of negligence or conversion for the amount of the item involved. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Security Pac. Nat'l Bank*, 23 Cal. App. 3d 638 (5th Dist. 1972).

This section in holding a payor bank "accountable for the amount" of a demand item, such as a check, where the bank retains the item beyond midnight on the banking day following the day it received the item, imposes liability for the full amount of the item. Where the defendant bank as payor bank, had upon presentment for payment dishonored a check payable to the plaintiff for insufficient funds on two prior occasions within the midnight deadline period, it is held that the failure of the defendant bank to return such check within the deadline period upon the third presentment of such check through a collection bank was excused. *Leaderbrand v. Central State Bank*, 202 Kan. 450, 450 P.2d 1 (1969).

"Accountability" for amount of item within Code § 4-302(a) imposes liability for full face amount of item even without proof of damages. *Farmers Coop. Livestock Mkt. v. Second Nat'l Bank of London*, 427 S.W.2d 247 (Ky. 1968).

A bank's measure of damages for late return of an item presented to it for payment is the amount of the item. *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 770, 779-781.

11 Am. Jur. 2d, Banks § 990.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:221-

4:225 (Collection of items; payor banks; late return).

CJS. 9 C.J.S., Banks and Banking §§ 341, 380.

§ 75-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank, comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

(1) The bank accepts or certifies the item;

(2) The bank pays the item in cash;

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement;

(4) The bank becomes accountable for the amount of the item under Section 75-4-302 dealing with the payor bank's responsibility for late return of items; or

(5) With respect to checks, a cutoff hour no earlier than one (1) hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a), items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

SOURCES: Codes, 1942, § 41A:4-303; Laws, 1966, ch. 316, § 4-303; Laws, 1992, ch. 420, § 101, eff from and after January 1, 1993.

Cross References — What constitutes acceptance of commercial paper, see § 75-3-410.

Certification of check, see § 75-3-411.

Settlement with right to revoke, see § 75-4-215.

Deferred posting, see § 75-4-301.

Payor bank's responsibility for late return of items, see § 75-4-302.

JUDICIAL DECISIONS

1. In general; issuance, acceptance of cashier checks.
2. —Bank money orders.
3. —Electronic funds transfer.
4. Payment in cash.
5. Completion of posting process.
6. Effect of court orders.
7. Order of payment.
8. Practice and procedure.

1. In general; issuance, acceptance of cashier checks.

A bank is not deprived of its right of set-off against a general business account by its knowledge that there are innocent third parties that are going to be injured. *Deposit Guar. Nat'l Bank v. B.N. Simrall & Son*, 524 So. 2d 295 (Miss. 1987).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman

check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. *Taboada v. Bank of Babylon*, 95 Misc.2d 1000 (1978).

A stop-payment order is one which countermands a previously valid order to draw money from a depositor's account. *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Where collecting bank accepted for collection check drawn on drawee bank for \$25,000 but misencoded such check as \$2,500 item; where drawee bank, relying on encoded figure of \$2,500, processed check electronically and paid it as \$2,500 item; and where drawer of check refused to allow drawee bank to debit drawer's account for remaining \$22,500, as between drawee bank and collecting bank, drawee bank was liable under UCC § 4-303 and § 4-403 for undebited sum of \$22,500, since after check was acted on by drawee bank, drawer no longer had authority to stop payment thereon. *First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co.*, 238 Ga. 693, 235 S.E.2d 1 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on

purchaser by payee. *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976).

Under UCC § 4-303 stop payment order given by purchaser and received by bank after it had issued cashier's check came too late to terminate or suspend bank's obligation to honor and pay it; purchaser's only remedy was action against payee. *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976).

Plaintiff bank was not entitled to recover \$3,025 which defendant received as proceeds of cashier's check issued to defendant by bank where defendant used personal check of one of bank's customers in same amount as cashier's check as payment for cashier's check and where bank's customer subsequently stopped payment on his check; when bank accepted its customer's check as payment for cashier's check, customer's check was paid in cash without any reservation of right to revoke settlement under UCC § 4-213(1)(a) and (b); thus, bank erred to its own prejudice when it did not inform its customer that his stop payment order came too late under UCC § 4-303(1)(b), and in honoring stop payment order when it was received too late. *Citizens & S. Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

A stop order, whether or not effective under other rules of law to terminate or suspend a bank's right or duty to pay an item, comes too late to terminate or suspend such right or duty if it is received after the bank has accepted or certified the item. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of con-

sideration or fraud. *TPO, Inc. v. FDIC*, 487 F.2d 131 (3d Cir. N.J. 1973) (applying New Jersey law).

Cashier's check was accepted when issued and it was beyond power of bank to stop payment on it since, under UCC § 4-303, stop payment order comes too late if order is received after bank has accepted item. *Kaufman v. Chase Manhattan Bank, Nat'l Ass'n*, 370 F. Supp. 276 (S.D.N.Y. 1973).

Payment may not be stopped once a cashier's check has been issued. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

2. —Bank money orders.

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. *Thompson Poultry, Inc. v. First Nat'l Bank*, 199 Neb. 8, 255 N.W.2d 856 (1977).

3. —Electronic funds transfer.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. N.Y. 1979).

4. Payment in cash.

Under UCC § 4-303 stop payment order came too late to modify bank's right or duty to pay check after bank had already paid item in cash. *Siniscalchi v. Valley Bank*, 79 Misc. 2d 64 (1974).

Where bank negligently paid check over drawer's stop payment order it was not entitled to recover payment from payee of check. *Anthony Roberts Properties, Inc. v. Industrial Val. Bank & Trust Co.*, 97 Montg. County L. Rep. 165 (Pa. 1973).

5. Completion of posting process.

Where checks received for payment from a depositor's account were not machine posted but were withdrawn, examined by a bank officer who indicated there were sufficient funds in the account to pay them, and the items were thereafter hand stamped and initialed but were not machine posted until a day subsequent to the receipt by the bank of trustee process which would have precluded their payment, the bank had prior to receipt of the process clearly manifested its decision to pay the items and it was clear that the trustee writ was served after such decision had been made and the writ was therefore served too late to terminate or suspend the bank's right and duty to charge the checks against the depositor's account. *Yandell v. White City Amusement Park*, 232 F. Supp. 582 (D. Mass. 1964).

6. Effect of court orders.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Payment on cashier's check issued by bank in favor of depositor and endorsed and delivered by him to third party could not be stopped in absence of court order or indemnification bond. *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103 (2d Dep't 1977), appeal dismissed, 43 N.Y.2d 695, 401 N.Y.S.2d 66, 371 N.E.2d 828 (1977), aff'd, 44 N.Y.2d 776, 406 N.Y.S.2d 30, 377 N.E.2d 474 (1978).

In suit by plaintiff customer against bank to recover amount of check allegedly paid by bank in defiance of plaintiff's stop-payment order, where check was initially presented to and paid by bank on January 9, 1975; where plaintiff later complained to bank that check had improper indorsement, and bank on June 24, 1975 notified plaintiff that its account had been reccredited with amount of check and that bank had placed stop-payment order

on check; where bank also sent plaintiff stop-payment order form which plaintiff duly executed and returned to bank on June 26, 1975; where plaintiff on December 5, 1975 wrote bank that stop-payment order was still in effect; and where bank on January 2, 1976, again received same check for payment, paid it despite fact that this time it had different indorsement (that of named payee), and redebited plaintiff's account with amount of check, trial court's judgment that stop-payment order was still in effect when bank paid check second time and that such payment was error would be affirmed because (1) nothing in record suggest any irregularity or misconstruction by bank with respect to such stop-payment order and its purpose; and (2) defendant's contention that check had been "finally paid" under UCC § 4-213(1)(b) and (c) and UCC § 4-303(1)(c) and (d) on January 9, 1975, and that such "final payment" had priority over plaintiff's subsequent stop-payment order, could not be sustained, since such stop-payment order related not to payment made on January 9, 1975, but to payment made on January 2, 1976. In such case, it was incongruous for bank to contend that it could rightfully pay check again because it had already "finally paid" it. *Trust Co. v. Student Air Travel Agency, Inc.*, 142 Ga. App. 248, 235 S.E.2d 670 (1977).

In bankruptcy proceeding bank was not entitled to set off checking account of bankrupt customer against customer's demand note to bank where bank did no more than declare its intention to set off account prior to date of order by bankruptcy court prohibiting such set offs; mere intra-mural declarations between employees of bank, accompanied by no affirmative acts and no steps to record transaction, were insufficient to effectuate set off. *Baker v. National City Bank*, 75 Ohio Op. 2d 275, 511 F.2d 1016 (6th Cir. Ohio 1975) (applying Ohio law).

Determining from non-code law that the process of posting a check to a depositor's account had not been completed prior to receipt by the bank of a restraining order prohibiting it from paying money from the account, the court held that the bank's duty to pay the check's payee was termi-

nated by its receipt of the order. *Gibbs v. Gerberich*, 1 Ohio App. 2d 93, 203 N.E.2d 851, 17 A.L.R.3d 928 (1964).

7. Order of payment.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Colorado Nat'l Bank v. First Nat'l Bank & Trust Co.*, 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and setoffs (UCC § 4-303(1)). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Where (1) buyer on November 16, 1976 paid for hog feed by check drawn on buyer's account with defendant first bank when such account contained sufficient funds, (2) before check was presented to first bank for payment, state bank examiner closed have and froze all of its accounts, (3) defendant second bank later assumed first bank's accounts, including buyer's account, and dishonored buyer's check when feed seller presented it for payment, (4) seller then sued buyer on check, and buyer defended suit on ground that both banks had wrongfully dishonored check, (5) seller obtained summary judgment on check on May 5, 1977 and attempted to levy execution against buyer's checking account on July 8, 1977, (6)

second bank, instead of surrendering funds in such account to sheriff, deposited such funds into court on July 11, 1977, and (7) buyer, on same day (May 5, 1977) that seller recovered summary judgment against him, assigned checking account to buyer's attorney for fees owed in prior litigation, court held (1) that trial court properly ruled that buyer's check to seller had priority to payment from funds in buyer's checking account as against buyer's assignment, nearly six months later, of such account to his attorney, (2) that second bank, by properly paying funds in checking account into court, rather than honoring check to seller drawn on such account or assignment of account to buyer's attorney, failed to establish any priority as between check and assignment, although bank under UCC § 4-303(2) could have paid either item if it had chosen to do so, (3) that under UCC § 1-103, common law governing assignments was still in effect, (4) that under UCC § 4-303(1), second bank, if it had so chosen, could have paid check to seller because it had been drawn prior to bank's receipt of notice that checking account had been assigned, even though check was actually received after such notice, (5) that fact that check had not been paid before second bank received notice of such assignment did not require that assignment should prevail over check, since second bank at no time received any stop-payment order on check, (6) that both check and assignment of buyer's checking account thus came before trial court on an equal footing, and (7) that trial court properly gave priority to check because it was first item issued, on the principle that as between rights otherwise equal, the earliest is preferred. *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Where bank had first lien on funds of drawer in special escrow accounts and right of setoff, holder of post-dated checks could not enforce priority payment out of escrow accounts. *Steinbrecher v. Fairfield County Trust Co.*, 5 Conn. Cir. Ct. 393, 255 A.2d 138 (1968).

8. Practice and procedure.

Where (1) IRS claimed priority over

proceeds of bank customer's checking account by virtue of notice of levy served on bank at 12:30 p.m., May 20, 1975, to recover delinquent taxes assessed against customer, (2) bank at 11:00 a.m. on same day had in its possession two checks drawn on it by such customer to pay balance and interest due on bank's loan to customer, and (3) bank claimed that prior to service of IRS notice of levy, it had taken action within meaning of UCC § 4-303(1)(d) that evidenced its decision to pay checks, thereby preempting the IRS tax lien, bank's claim was not sustained by evidence which showed (1) that customer had delivered its second check for interest on loan to teller in bank's loan department at about 11:00 a.m., (2) that teller was then busy and put such check aside, together with customer's other check and note that evidenced the loan, (3) that teller did not know whether sufficient funds were in customer's account to pay such checks, (4) that bank officer who knew that account had sufficient funds did not inform teller of such fact, (5) that such bank officer did not know that customer's second check had been delivered to teller, and (6) that no bank official with full knowledge of the facts actually made any decision to pay the two checks. In such case, bank's evidence showed only certain acts preliminary to a true decision to pay checks and was insufficient under UCC § 4-303(1)(d). *Citizens & Peoples Nat'l Bank v. United States*, 570 F.2d 1279 (5th Cir. Fla. 1978) (applying Florida law).

In action under UCC § 5-114(2)(b) by corporation procuring issuance of letter of credit to restrain issuing bank from making payment to letter's beneficiary because of beneficiary's alleged fraud, injunction could not be issued under UCC § 4-303(1)(d) where before temporary restraining order was served on issuing bank, it had determined that beneficiary had complied with terms of letter, had honored letter by mailing check to beneficiary, and had completed process of posting such check to plaintiff's account. *Tranarg, C.A. v. Banca Commerciale Italiana*, 90 Misc. 2d 829 (1977).

RESEARCH REFERENCES

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| <p>ALR. Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order. 97 A.L.R.3d 714.</p> <p>Am Jur. 10 Am. Jur. 2d, Banks §§ 859-866.</p> <p>11 Am. Jur. 2d, Banks § 955.</p> <p>6 Am. Jur. Pl & Pr Forms (Rev), Bank</p> | <p>Deposits and Collections, Forms 4:241-4:244 (Collection of items; payor banks; items subject to notice or stop-payment order).</p> <p>CJS. 9 C.J.S., Banks and Banking §§ 328, 329, 332, 337, 341, 351, 357, 358, 405, 408, 440 et seq.</p> |
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PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

SEC.

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| <p>75-4-401.</p> <p>75-4-402.</p> <p>75-4-403.</p> <p>75-4-404.</p> <p>75-4-405.</p> <p>75-4-406.</p> <p>75-4-407.</p> | <p>When bank may charge customer's account.</p> <p>Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.</p> <p>Customer's right to stop payment; burden of proof of loss.</p> <p>Bank not obligated to pay check more than six (6) months old.</p> <p>Death or incompetence of customer.</p> <p>Customer's duty to discover and report unauthorized signature or alteration.</p> <p>Payor bank's right to subrogation on improper payment.</p> |
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§ 75-4-401. When bank may charge customer's account.

- (a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.
- (b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.
- (c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in Section 75-4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Section 75-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under Section 75-4-402.
- (d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:
- (1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

SOURCES: Codes, 1942, § 41A:4-401; Laws, 1966, ch. 316, § 4-401; Laws, 1992, ch. 420, § 102, eff from and after January 1, 1993.

Cross References — Incomplete instruments, see § 75-3-115.

Alteration of instruments, when material and effect, see § 75-3-407.

JUDICIAL DECISIONS

1. In general.
2. "Properly payable" item.
3. —Conversion.
4. Cosignatory's liability.
5. Creation of overdraft.
6. Bank's good faith; due care.
7. Notice knowledge.
8. Drawer's liability; improper completion.
9. Practice and procedure.

1. In general.

Although Uniform Commercial Code governs relationship between payor bank and its customers, particularly UCC §§ 4-401 to 4-407, it has not displaced general rule that, without authority from maker or other acceptable justification, check, drawn to order of bank precludes diversion proceeds of such check to use other than that of drawer. *Transamerica Ins. Co. v. United States Nat'l Bank*, 276 Or. 945, 558 P.2d 328 (1976).

2. "Properly payable" item.

Where (1) money given to plaintiff wife in trust for her children was deposited in savings bank trust accounts at defendant savings bank, (2) plaintiff's husband forged plaintiff's signature on both bank signature cards and also on four withdrawal orders against such trust accounts, (3) defendant savings bank honored withdrawal orders by issuing as payment thereon four checks made payable to plaintiff which were drawn on defendant's own account at another bank, (4) plaintiff's husband forged plaintiff's indorsement on such checks and deposited them in his business account at still another bank, and (5) husband's bank then forwarded such checks to defendant's bank which accepted and paid them, in

conversion action against defendant bank, plaintiff established prima facie case since defendant could not under UCC § 4-401 debit plaintiff's account for withdrawals made by plaintiff's husband without plaintiff's authorization and under UCC § 3-419(1)(c), instruments were converted when they were paid on forged indorsements. Payment of the four withdrawal orders bearing plaintiff's forged signature was made by defendant when defendant's own bank accepted the four checks drawn by defendant and paid out on them on defendant's account, and fact that defendant did not pay cash over the counter on such withdrawal orders, but ordered its own bank to make payment thereon, did not alter legal effect of transaction. *Ahrens v. Westchester Fed. Sav. & Loan Ass'n*, 58 A.D.2d 799 (2d Dep't 1977).

Check that was presented to drawer's bank was "otherwise properly payable" under UCC § 4-401(1), notwithstanding payee failed to endorse check and collecting bank failed to supply missing endorsement, where check was made payable to order of named payee and was delivered to payee. *First Nat'l Bank v. Barrett*, 141 Ga. App. 161, 233 S.E.2d 24 (1977).

3. —Conversion.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant

could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of *Price v. Neal* (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank. *United States v. Pavloski*, 574 F.2d 933 (7th Cir. Wis. 1978) (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based).

4. Cosignatory's liability.

Cosignatory on joint checking account was not liable for overdraft beyond balance of joint account where cosignatory neither participated in transaction creating overdraft nor received funds as result of it. *Cambridge Trust Co. v. Carney*, 115 N.H. 94, 333 A.2d 442 (1975).

The Code does not alter the prior rule that in the case of a joint account one cosignatory cannot be held beyond the balance in the account and that a joint deposit does not make each cosignatory the agent of the other with respect to the making of overdrafts. *National Bank v. Derhammer*, 16 Pa. D. & C.2d 286 (1959).

5. Creation of overdraft.

Where (1) check, drawn on December 3, 1973 on account with insufficient funds by drawer of apparently unstable mind, was dishonored before drawer's death by branch office of defendant bank, (2) payee re-presented check at defendant's main

office, and teller who cashed it violated defendant's rule about cashing checks for more than \$500 without obtaining manager's approval, (3) drawer's attorney requested defendant to place "hold" order on drawer's account, and two such orders were entered on December 5 and 6, 1973, and (4) on drawer's death, defendant set off amount of check against certificate of deposit held by drawer with defendant, and defendant's estate sought to recover such sum, court held (1) that since check was properly payable on its face and otherwise, defendant under UCC § 4-401(1) had right to charge it against drawer's account, even though such charge created overdraft, (2) teller's violation of rule about cashing checks could not be invoked for benefit of estate, since it was internal bank rule only, (3) prior dishonor of check did not affect defendant's right to pay it on later presentment, and (4) under UCC § 4-405(1), "hold" orders of drawer's attorney on drawer's account were not effective, since drawer had not been adjudicated to be an incompetent. *Lincoln Nat'l Bank & Trust Co. v. Peoples Trust Bank*, 177 Ind. App. 312, 379 N.E.2d 527 (1978).

Right of bank under UCC § 4-401(1) to charge worthless check against customer's account, even though such charge created overdraft, did not excuse bad-check violation of defendant in criminal case, since bank's authority to take such action is conferred by a purely civil statute and, in any event, is discretionary. *Warren v. Commonwealth*, 219 Va. 416, 247 S.E.2d 692 (1978).

In action by payor bank against collecting bank to recover payment of checks made out to fictitious payees, collecting bank, which had guaranteed all prior indorsements on checks, could not successfully assert as defense that payor bank had been negligent in making payment against nonexistent funds, since UCC § 4-401 expressly permits payor bank to charge customer's account, even though such charge creates overdraft. *Bank Leumi Trust Co. v. Marine Midland Bank*, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

It is perfectly legal for bank to charge item against customer's account even though charge creates an overdraft; result is merely extension of credit to customer. *State v. Mullin*, 225 N.W.2d 305, 75 A.L.R.3d 1072 (Iowa 1975).

When presented with an overdraft otherwise properly payable, drawee bank may pay overdraft and collect amount paid from drawer, since draft itself constitutes authorization to pay and to charge drawer with amount thereof. *City Bank v. Tenn*, 52 Haw. 51, 469 P.2d 816 (1970).

6. Bank's good faith; due care.

Although customer's sister who appeared at bank before bank knew of customer's death and who stated that customer had decided to close out his account did not have authority to make withdrawal, bank which checked authenticity of customer's signature on check and identification of sister acted in good faith was not liable to customer's estate under UCC § 4-401(2). *Russello v. Highland Nat'l Bank*, 56 A.D.2d 772 (1st Dep't 1977).

Drawee bank had obligation to drawer, its customer, to exercise due care and it had authority to charge drawer's account only for checks it cashed "in good faith" under UCC § 4-401; thus, if drawee bank cashed checks, forged by drawer's employee, as result of its own negligence and not in good faith, it was liable to drawer notwithstanding effectiveness of endorsements. *Board of Higher Educ. v. Bankers Trust Co.*, 86 Misc. 2d 560 (1976).

Where undated checks were issued in 1955 and were completed in 1964 with the then current date, the bank formed by the merger of the original drawee and another bank was protected where it in good faith honored such checks. *Newman v. Manufacturers Nat'l Bank*, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

The drawee is entitled to accept the date of the check as true where there is nothing to indicate the contrary since the date on an instrument is "presumed to be correct." *Newman v. Manufacturers Nat'l Bank*, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

7. Notice knowledge.

Where a bank had knowledge of the limited authority of a fiduciary, such bank may be held liable for checks paid in excess of that authority and also without the surety's co-signature. *Barad v. Bank of Commerce*, 31 A.D.2d 809 (2d Dep't 1969).

8. Drawer's liability; improper completion.

Where an attorney forged his client's signature on a multi-party check made out to attorney and client in settlement of a negligence action, the drawer, by negligently failing to notify the payor bank of the forgery, was liable to client for payment of the check proceeds to the attorney. *Dobbins v. National Union Ins. Co.*, 70 Misc. 2d 1087 (1972).

9. Practice and procedure.

Under UCC § 4-401, bank was lawfully entitled to pay overdraft and to seek recourse from its customer, notwithstanding evidence that under bank's usual internal procedures and policies, bank would have known check represented overdraft and would not have paid it, where customer's conversations with bank employees concerning overdraft policies did not constitute contractual arrangement that check would be dishonored and where there was no claim that bank was estopped as result of conversation relating to overdraft. *Continental Bank v. Fitting*, 114 Ariz. 98, 559 P.2d 218 (Ct. App. 1977).

A depositor's allegation that the defendant bank, with knowledge that two other customers were engaged in check kiting, manipulated the three accounts so as to appropriate to itself money lost by plaintiff who had drawn checks in large amounts to one of the kiting customers was sufficient to state a good cause of action, since whatever might be the bank's right to recover its losses from one customer at the expense of another, it must do so in good faith. *J.F. Braun & Sons v. First Nat'l City Bank*, 32 A.D.2d 749 (1st Dep't 1969).

RESEARCH REFERENCES

ALR. Effect of bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Bank's liability for payment or withdrawal on less than required number of signatures. 7 A.L.R.4th 655.

Am Jur. 10 Am. Jur. 2d, Banks § 776.

11 Am. Jur. 2d, Banks §§ 909 et seq., 937, 938.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:251-4:259 (Relationship between payor bank and customer; right to charge customer's account).

4 Am. Jur. Pl & Pr Forms (Rev), Banks, Forms 61 et seq. (withdrawals and payments).

CJS. 9 C.J.S., Banks and Banking §§ 397, 398, 405.

§ 75-4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.

(a) Except as otherwise provided in this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

SOURCES: Codes, 1942, § 41A:4-402; Laws, 1966, ch. 316, § 4-402; Laws, 1992, ch. 420, § 103, eff from and after January 1, 1993.

Cross References — Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

JUDICIAL DECISIONS

1. In general.
2. Relationship to other laws.
3. Customer.
4. Damages.
5. Wrongful dishonor.
6. Mistake.
7. Practice and procedure.

1. In general.

UCC § 4-402 obligates a bank, unless it has a lawful excuse to dishonor, to honor drafts drawn on its customer's account if the account has sufficient funds. However, UCC § 4-402 does not apply to the dishonor of a draft presented by one who is

not a customer of the bank. *Riverside Nat'l Bank v. Lewis*, 572 S.W.2d 553 (Tex. Civ. App. 1978), remanded, 603 S.W.2d 169 (Tex. 1980), on remand, 605 S.W.2d 954 (Tex. Civ. App. Houston 1st Dist. 1980).

Bank's liability for damages proximately caused by wrongful dishonor of item (1) is governed by UCC § 4-402, (2) is limited to actual damages proved when dishonor occurs through bank's mistake, and (3) if so proximately caused and proved, recovery may include consequential damages, as for loss of credit and mental anguish. *First Nat'l Bank v. Hubbs*, 566 S.W.2d 375 (Tex. Civ. App. 1978).

The liability of a bank for wrongful dishonor of a customer's item is enunciated in UCC § 4-402, under which consequential damages which are proved can be recovered. *Luxonomy Cars, Inc. v. Citibank*, 65 A.D.2d 549 (2d Dep't 1978).

Under UCC § 4-402, bank is obligated to honor drafts drawn on customer's account if account has sufficient funds, absent any lawful excuse for dishonor. *Baytown State Bank v. Don McMillian Leasing Co.*, 551 S.W.2d 771 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

A bank which wrongfully dishonors the checks of a partnership is liable in damages to the partnership and not to the partners individually. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

2. Relationship to other laws.

A New York statute forbidding a bank from honoring withdrawals from an account specified in a restraining notice, except pursuant to court order, relieves the bank from liability under this section for refusal to honor its depositor's checks after service of such a notice. *Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co.*, 47 Misc. 2d 741 (1965), aff'd, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

3. Customer.

Under UCC § 4-104(1)(e), president of corporation was not "customer" of bank with respect to corporation's checking account, notwithstanding he opened corpo-

rate account, determined who would draw on it and also had personal account with bank, and thus he did not have cause of action against bank under UCC § 4-402 for wrongful dishonor of checks drawn on corporate account. *Farmers Bank v. Sinwellan Corp.*, 367 A.2d 180 (Del. 1976).

Incorporators of corporation were "customers" of bank within contemplation of UCC § 4-402 where bank and bank officer looked directly to incorporators to satisfy obligations of corporation by requiring incorporators to execute personal guaranties of loans to corporation and to cover credit bank extended to corporation in form of honoring its overdrafts, where corporation had never issued shares and was under-capitalized and incorporators alone controlled its financial affairs and personally vouched for its fiscal responsibility, where bank, and suppliers and employees of corporation, knew this was situation, and where it was entirely foreseeable that dishonoring of corporation checks would reflect directly on personal credit and reputation of incorporators and that they would suffer adverse personal consequences if bank reneged on its commitments. Thus, in action against bank for wrongful dishonor of corporation's checks, individual incorporators were entitled to recover damages for intentional infliction of emotional distress, even though bank's conduct involved breach of contract, but were not entitled to recover punitive damages in absence of proof of "evil motive" on part of bank. *Kendall Yacht Corp. v. United Cal. Bank*, 50 Cal. App. 3d 949 (4th Dist. 1975).

4. Damages.

Award of damages under UCC § 4-402 to customer of bank for bank's wrongful dishonor of customer's check was not justified where customer failed to prove that any loss had proximately resulted from bank's action. *Charles Ragusa & Son v. Community State Bank*, 360 So. 2d 231 (La. App. 1978) (noting that evidence did not show that bank's action had affected plaintiff's credit or commercial reputation).

Where bank dishonored customer's check by mistake, customer was not entitled to damages on presumption that mere fact of dishonor injuriously affected

her business reputation; under UCC § 4-402 customer could recover only actual damages. *Continental Bank v. Fitting*, 114 Ariz. 98, 559 P.2d 218 (Ct. App. 1977).

Statutory reference to "damages proximately caused", "actual damages proved", and "consequential damages" authorized trial judge to award damages by determining annual loss of profits to plaintiff from termination of this relationship with his supplier and to project this loss for three-year period in suit for damages allegedly suffered by customer of bank resulting from bank's erroneously dishonoring customer's check given to supplier. *Skov v. Chase Manhattan Bank*, 407 F.2d 1318 (3d Cir. V.I. 1969).

In action for wrongful dishonor of checks, depositor could recover for harm to business and credit standing as established by un rebutted presumption that such harm results from wrongful dishonor, but there could be no recovery for loss of business income and mental anxiety and suffering in absence of sufficient evidence that these were proximately caused by wrongful dishonor. *American Fletcher Nat'l Bank & Trust Co. v. Flick*, 146 Ind. App. 122, 252 N.E.2d 839 (1969).

5. Wrongful dishonor.

Where bank, which was both payor bank and depository bank as to two checks representing estate funds which were deposited by payee in payee's checking account with bank, had only reserved under payee's deposit contract right to charge back any item before final payment, and where bank did not attempt to recover estate funds represented by such checks until nine days after bank had received checks, final payment of such checks had already occurred under UCC § 4-213(1)(d) before bank attempted to recover such funds. However, in payee's suit against bank under UCC § 4-402 for dishonoring checks written by payee against his account after the two checks representing estate funds in issue had been deposited in payee's account, court would reverse summary judgment for bank and remand cause for new trial on issue of bad faith of payee in participating in deposit of such funds in payee's account in violation of court decree in estate proceeding. *Bartlett v. Bank of Carroll*, 218

Va. 240, 237 S.E.2d 115 (1977) (observing that UCC Art 4 neither specifically contemplates nor excludes recovery by bank after final payment of item when person receiving the credit has acted in bad faith).

Bank was liable to its customer for wrongful dishonor of several checks under UCC § 4-402 and evidence supported award of \$2,000 actual damages and \$3,500 punitive damages where, inter alia: (1) bank charged back to customer's account \$275 check which had been cashed in name of customer by forged endorsement, dishonored customer's checks because of charge back, and charged customer \$15 for checks drawn on insufficient funds; (2) as result of dishonor, customer missed approximately one week of work and school, suffered humiliation and embarrassment as result of dishonored checks, and matter ultimately was turned over to collection agency; (3) and each step taken by bank was deliberate, intentional and done with knowledge of plaintiff's claim of right. *Northshore Bank v. Palmer*, 525 S.W.2d 718 (Tex. Civ. App. 1975), ref. n.r.e (Oct. 22, 1975).

Bank was not liable to its customer for wrongful dishonor of draft where, although bank had granted customer line of credit, customer had exceeded or "overdrawn" amount of such credit. *Modoc Meat & Cattle Co. v. First State Bank*, 271 Or. 276, 532 P.2d 21 (1975).

6. Mistake.

Where bank applied funds in a partnership account to liquidate personal indebtedness of an individual partner thereby causing partnership's outstanding checks to be dishonored for insufficiency of funds, the question of whether the dishonor occurred merely as a consequence of the bank's mistake is one of fact to be determined by the jury. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

7. Practice and procedure.

Evidence that depositor established "special account" in defendant bank, that checks drawn on such account required signatures of two of three persons, depositor, depositor's contractor or officer of

bank, and that depositor issued check to his wife for balance of account, that she presented check to bank officer for his signature, but he refused to sign check stating that money in account did not belong to depositor, and that bank officer later admitted money in account belonged to depositor and bank had no interest in or claim against it, was sufficient to support recovery for wrongful dishonor notwithstanding fact that check issued to depositor's wife did not carry two signatures, since missing signature was that of bank officer and, by that officer's testimony, it was clear that bank had no interest in money on deposit. *Wallick v. First State Bank*, 532 S.W.2d 520 (Mo. Ct. App. 1976).

Although a bank is liable to its customer for "wrongful dishonor" under the Uniform Commercial Code, it is forbidden under CPLR 5222 to honor withdrawals from an account specified in a restraining notice except pursuant to court order, and since a bank is thus restrained under a statute subsequent to the one creating a liability to its customer, any question of liability should yield to the consideration that the temporary dishonor of a customer's checks after service of a restraining notice cannot be said to be wrongful. *Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co.*, 47 Misc. 2d 741 (1965), *aff'd*, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

RESEARCH REFERENCES

ALR. Liability for negligently causing arrest or prosecution of another. 99 A.L.R.3d 1113.

What constitutes wrongful dishonor of check rendering payor bank liable to drawer under UCC § 4-402. 88 A.L.R.4th 568.

Who may recover for wrongful dishonor of check under UCC § 4-402. 88 A.L.R.4th 613.

Damages recoverable for wrongful dishonor of check under UCC § 4-402. 88 A.L.R.4th 644.

Am Jur. 11 Am. Jur. 2d, Banks §§ 940-953.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:271-4:279 (Relationship between payor bank and customer; wrongful dishonor).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2311 et seq. (Liability of bank to customer for wrongful dishonor).

CJS. 9 C.J.S., Banks and Banking §§ 326, 352-355.

§ 75-4-403. Customer's right to stop payment; burden of proof of loss.

(a) A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in Section 75-4-303. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six (6) months, but it lapses after fourteen (14) calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an

account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under Section 75-4-402.

SOURCES: Codes, 1942, § 41A:4-403; Laws, 1966, ch. 316, § 4-403; Laws, 1992, ch. 420, § 104, eff from and after January 1, 1993.

Cross References — Drawer's liability to holder in due course, see §§ 75-3-305, 75-3-413.

Certification of check, see §§ 75-3-411, 75-4-303.

When payment or acceptance final, see § 75-3-418.

Discharge by payment or satisfaction to holder, see § 75-3-603.

Bank's responsibility for lack of good faith or failure to exercise ordinary care, see § 75-4-103.

Payment after notice of death, see § 75-4-405.

Payment of item over stop payment order, subrogation, see § 75-4-407.

JUDICIAL DECISIONS

1. In general.
2. Purpose.
3. Applicability to purchase money order.
4. Customer.
5. Stop payment order.
6. —Exculpatory clauses.
7. —Renewal.
8. —Effect.
9. Payment contrary to stop order.
10. Loss.
11. Rights of holder.
12. Pleadings.
13. Burden of proof.
14. Novation.
15. Setoff.
16. Subrogation.

1. In general.

Since cashier's check is primary obligation of issuing bank (which, acting as both drawer and drawee, accepts check on its issuance) and is not item payable for customer's account within meaning of UCC § 4-403(1), issuing bank was not under any legal obligation to honor stop-payment order of customer, to whom bank had issued cashier's check and who had indorsed and delivered it to a third party, to stop payment before check was paid. *Dziurak v. Chase Manhattan Bank*, 44 N.Y.2d 776, 377 N.E.2d 474 (1978).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. *Maintenance Serv., Inc. v. Royal Nat'l*

Bank, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

The power of a drawer to stop payment on his check does not release him from liability a subsequent holder in due course of the check. *Texico State Bank v. Hullinger*, 75 Ill. App. 2d 212, 220 N.E.2d 248 (4th Dist. 1966).

Where a bank issues a teller's check on another bank to depositor payable to a third person, the issuing bank is liable for the amount thereof if it stops payment under the above statute. *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705 (1965).

When the Uniform Commercial Code becomes effective in Massachusetts, it will still be the law, as it was at common law and under the Massachusetts version of the Negotiable Instruments Law, that the drawer of a check has an absolute right to order payment stopped, before the order to pay represented by the check is carried out, and that if the drawee bank afterward makes payment thereon, it acts at its peril. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

2. Purpose.

One purpose of granting authority and providing procedure to stop payment of a check as is done in this section is to afford protection to party who may have discovered fraud or engaged in a disagreement as to terms or consideration in connection with the underlying contract pursuant to

which check was issued. The other purpose of prescribing procedure for payment stoppage is to protect the bank on which the check is drawn. *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705 (1965).

3. Applicability to purchase money order.

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), *aff'd*, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

4. Customer.

Since a bank carrying an account with another bank is a "customer" within the definition in UCC § 4-104 (1e), such a bank may stop payment on a check drawn by it on such other bank under the procedure prescribed by the above statute. *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705 (1965).

5. Stop payment order.

Oral request to strike signature of officer from corporation's checking account signature card did not constitute "stop payment order" within meaning of UCC § 4-403, since revocation of authority to execute checks did not constitute countermand to previous payment order. *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

6. —Exculpatory clauses.

Provision embraced in written request to stop payment of check executed by depositor and providing that should the check be paid through inadvertence, accident or oversight, the bank will in no way

be held responsible, and absolving the bank from all liability for payment of the check in the course of the bank's business held invalid as against public policy in permitting the bank to contract against liability for its own negligence. *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954).

7. —Renewal.

Where depositor allegedly entered into oral agreement with bank concerning certain restrictions on his accounts and, pursuant to such agreement, sent letter to bank directing it not to pay any instruments drawn on his accounts unless instruments were on "printed checks of the bank", and where bank merely acknowledged "receipt" of customer's letter, such "receipt" could not be legally interpreted as general, unlimited lifetime "agreement," but at best was receipt of notice of stop payment and, in accord with UCC § 4-403(2) unless renewed in writing, was effective for only six months; stop payment order was not extended beyond statutory limitation by virtue of alleged "oral agreement" simultaneously made with written stop payment order. *Dinerman v. National Bank of N. Am.*, 89 Misc. 2d 164 (1977).

In order to protect himself, issuer of check must either renew a stop payment order every 6 months (UCC § 4-403, subd 2) or close his account since, under UCC § 4-404, a drawee bank may in good faith honor checks over 6 months old without making inquiry of its customer. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), *rev'd* on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

8. —Effect.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

9. Payment contrary to stop order.

Where collecting bank accepted for collection check drawn on drawee bank for \$25,000 but misencoded such check as \$2,500 item; where drawee bank, relying on encoded figure of \$2,500, processed check electronically and paid it as \$2,500 item; and where drawer of check refused to allow drawee bank to debit drawer's account for remaining \$22,500, as between drawee bank and collecting bank, drawee bank was liable under UCC § 4-303 and § 4-403 for undebited sum of \$22,500, since after check was acted on by drawee bank, drawer no longer had authority to stop payment thereon. *First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co.*, 238 Ga. 693, 235 S.E.2d 1 (1977).

Where check made out to payee for purchase of rug was cashed by bank after stop payment order had been entered on check in question, bank was liable to drawer for amount of check, absent any showing by bank of lesser loss or nonloss on part of drawer. *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284 (1976).

Notwithstanding stop payment order contained one digit mistake in describing check to be stopped, adequate notice and reasonable opportunity to act were given to bank pursuant to UCC § 4-403(1) so as to make bank responsible for paying check in contravention of stop payment order where detailed direction was given to bank to stop payment, order was confirmed in writing early in morning, and check was paid afternoon of following day at same bank branch at which stop payment order was given. *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284 (1976).

Even though under UCC § 4-406, drawer could not recover for unauthorized signature or any alteration after lapse of 60 days, UCC § 4-406 did not apply to

recovery under UCC § 4-403 for payment in contravention of binding stop payment order and drawer had right to recover as matter of law under UCC § 4-403, where written stop payment order was sent to and received by bank so as to afford bank reasonable time to act, bank paid checks in contravention of order within six months, payments were made to persons not authorized to receive payments, and, as a result, drawer suffered loss. *Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co.*, 137 Ga. App. 521, 224 S.E.2d 498 (1976).

Even though check was "improperly" paid by payor bank under UCC § 4-403 after bank had received stop payment order from its customer, check was nonetheless "finally" paid under § 4-213 when customer's account was charged with item; when check was honored by payor bank, provisional settlement received by payee's bank for item became final and money became available for withdrawal by payee as matter of right. *Aljax Corp. v. Connecticut Mut. Life Ins. Co.*, 458 Pa. 57, 333 A.2d 469 (1974).

Where payor bank did not refuse to comply with joint depositor's order to stop payment on other joint depositor's check but payment was caused by computer error, and there was express joint account deposit agreement wherein each joint depositor appointed other as attorney for purpose of disposition of funds in account, stop-payment order was valid whether joint depositor executing stop-payment order was considered agent of other joint depositor concerning disposition of funds or as principal disaffirming act of other joint depositor in making withdrawal, and bank was not entitled to reimbursement. *Valley Bank & Trust Co. v. Weyerman Feathers*, 30 Utah 2d 161, 514 P.2d 1282 (1973).

Where personal check which formed consideration for cashier's check issued by bank was subject to stop payment order, holder of both cashier's check and personal check could not be charged with bank's failure to respond to stop payment order; and bank was liable for damages resulting from its stopping payment on cashier's check. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973).

Drawee bank cleared check over stop payment order and deposited proceeds in payee's account; held, drawee bank was precluded from debiting payee's account for proceeds after error was discovered, where funds represented by teller's check drawn by savings and loan association were in fact funds belonging to payee. *Wells v. Washington Heights Fed. Sav. & Loan Ass'n*, 63 Misc. 2d 424 (1970).

Drawee who has made improper payment in violation of effective stop-payment request is subrogated to rights of payee-holder in due course to whom maker of instrument would have remained liable if payment had been stopped as requested. *D. Brewster Bumper Corp. v. Irwin Sav. & Trust Co.*, 44 Pa. D. & C.2d 138 (1967).

Where a depositor and maker of a check moves for summary judgment pursuant to this section it is part of his prima facie case to allege and thereafter prove that he has been damaged by reason of the bank's wrongful payment of the check after receipt of timely and proper stop-payment order and absent ratification, but this is not to say that a depositor in such circumstances can be compelled against his will to litigate with the check's payee before he can take action against the bank. *Cicci v. Lincoln Nat'l Bank & Trust Co.*, 46 Misc. 2d 465 (1965).

10. Loss.

Since bank which violates valid stop-payment order on check is subrogated under UCC § 4-407(b) to rights of payee against drawer to prevent any unjust enrichment of drawer, it makes little sense to define term "loss," as used in UCC § 4-403(3), to mean amount of check paid by bank when UCC § 4-407(b) gives bank possible subrogation claims against drawer which would reduce amount for which bank might be held liable to drawer. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

In action for wrongful payment of check after stop payment order had been given bank, mere proof of reduction of bank account by amount of check was not proof of loss under this section because if that were acceptable proof of loss there would be no reason for subdivision (3) hereof.

Cicci v. Lincoln Nat'l Bank & Trust Co., 46 Misc. 2d 465 (1965).

11. Rights of holder.

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

12. Pleadings.

A complaint alleging that delivery of a stop payment order to a bank as "some-time during the spring of 1954 and before July 21, 1954 (the exact date being now unknown to Plaintiff)," was objectionable in failing to state the date of the agreement or a reasonably specific date on which the bank customer relied, and in failing to identify sufficiently the persons with whom the customer dealt on behalf of the bank. *Dinger v. Market St. Trust Co.*, 7 Pa. D. & C.2d 674 (1957).

13. Burden of proof.

In absence of North Carolina case law or statements in Official UCC Comments or North Carolina UCC Comments to UCC § 4-403(3) defining "loss" as used in such section, court would conclude that where bank pleads no loss by bank customer from bank's violation of valid stop-payment order on check, customer in order to recover damages for violation of such order must show loss other than mere debiting of customer's bank account with amount of check paid. Otherwise, there would be no reason for enactment of UCC § 4-403(3), which places on customer burden of establishing "amount of loss" resulting from payment of item contrary to binding stop-payment order. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

UCC § 4-403(3) and § 4-407 may present a question as to who has the

ultimate burden of proof as to the loss caused to a bank's customer by the bank's violation of a valid stop-payment order on a check. The better rule is to place the ultimate burden of proof of loss on the customer. Initially, the customer establishes a prima-facie case when he shows that the bank paid a check contrary to a valid stop-payment order. Thereupon, the bank, exercising its subrogation rights under UCC § 4-407, has the burden of coming forward and presenting evidence of an absence of actual loss to the customer. When the bank meets the burden of coming forward with such evidence, the customer must then sustain the ultimate burden of proof. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

14. Novation.

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. *Jefferies & Co. v. Arkus-Duntov*, 357 F. Supp. 1206 (S.D.N.Y. 1973) (applying New York law).

15. Setoff.

Even assuming that bank failed to exercise ordinary care in honoring and paying corporate check signed by former officer of corporation, such action did not constitute, pursuant to UCC §§ 4-402 and 4-403, setoff defense against bank available to guarantor of debts of corporation in absence of assertion and showing of resultant damage to corporation. *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

Even though purchaser of personal money order had stopped payment and

received back from issuing bank the funds he had given for it, bank was not entitled to refuse to pay amount of money order to party who, before payment was stopped, had accepted money order and released automobile on which he had lien for storage services, especially where bank had added to illusion that money orders carried different connotations from checks by providing phrase on money order indicating that it was not valid over \$1,000, an amount in excess of money order. *Mirabile v. Udoh*, 92 Misc. 2d 168 (1977).

16. Subrogation.

Plaintiff bank, which paid the buyer's \$19,500 check to the seller over the buyer's stop payment order (Uniform Commercial Code, § 4-403), and then, following a settlement of the dispute over the delivery of defective machinery between the buyer and the seller, agreed to accept \$5,000 from the seller in discharge of the seller's obligation to it, thereby relinquishing its rights to proceed in subrogation against the seller, is subrogated to the seller's right against the buyer "under the transaction" to be paid for the merchandise delivered, less \$5,000 and undiminished by the settlement, and is additionally entitled to recover from the buyer to the extent that the buyer has been unjustly enriched in the transaction and settlement with the seller (Uniform Commercial Code, § 4-407); the amount to which plaintiff shall be entitled is the greater of the amount by which the buyer was unjustly enriched by payment of the check or the extent to which the seller was entitled to payment from the buyer when the check was issued, in no event exceeding \$14,500 and interest. *Manufacturers Hanover Trust Co. v. AVA Indus., Inc.*, 98 Misc. 2d 614 (1978).

RESEARCH REFERENCES

ALR. Stipulation relieving bank from, or limiting its liability for disregard of, stop-payment order. 1 A.L.R.2d 1155.

What conduct by drawee of check before receipt of stop payment order, renders order ineffectual. 10 A.L.R.2d 428.

Bank's liability for payment of check

drawn by one depositor after stop payment order by joint depositor. 55 A.L.R.2d 975.

Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order. 97 A.L.R.3d 714.

Banks and banking: construction and

effect of UCC § 4-403(2) regulating oral or written nature of stop-payment order. 29 A.L.R.4th 228.

Sufficiency of description of check in stop-payment order under UCC § 4-403. 35 A.L.R.4th 985.

Am Jur. 11 Am. Jur. 2d, Banks §§ 955 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank

Deposits and Collections, Forms 4:291-4:307. (Relationship between payor bank and customer; stop-payment orders).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2321 et seq. (Right of customer to stop payment).

CJS. 9 C.J.S., Banks and Banking §§ 326, 352-355.

§ 75-4-404. Bank not obligated to pay check more than six (6) months old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six (6) months after its date, but it may charge its customer's account for payment made thereafter in good faith.

SOURCES: Codes, 1942, § 41A:4-404; Laws, 1966, ch. 316, § 4-404, eff March 31, 1968.

Cross References — Certification of check, see § 75-3-411.

Obligation of maker, drawer, or acceptor, see § 75-3-413.

JUDICIAL DECISIONS

1. In general.

Although UCC § 4-404 protects a bank which pays a stale check as long as it acted in good faith, it does not eliminate the requirement, imposed by UCC § 4-103(1), of ordinary care that a bank must observe in all its dealings. Thus, when a bank's actions are put in issue, it must show that it exercised the requisite degree of care with regard to its customer. *Charles Ragusa & Son v. Community State Bank*, 360 So. 2d 231 (La. App. 1978) (holding, where defendant bank paid check more than three years after it had been issued, lost, and customer had placed stop order thereon, that bank had not exercised requisite degree of care toward its customer, and that under UCC § 4-103(5), customer was properly awarded face amount of such check).

While UCC § 4-404 protects bank that pays stale check so long as bank acts in good faith, it does not eliminate requirement of ordinary care which bank must observe in all its dealings. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 79 Misc. 2d 149 (1973).

Drawee bank's payment of 14-month-old check without making inquiry of drawer was in good faith under UCC § 1-201, subd 19 and thus permissible under UCC § 4-404 where good faith of drawee bank was not disputed. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

The phrase "in good faith", as used in UCC § 4-404, refers to the general definition of good faith contained in UCC § 1-201, subd 19. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

UCC § 4-404, permitting drawee bank to honor check over 6 months old without making inquiry of customer, changes prior case law to the contrary. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

In order to protect himself, issuer of check must either renew a stop payment order every 6 months (UCC § 4-403, subd 2) or close his account since, under UCC § 4-404, a drawee bank may in good faith

honor checks over 6 months old without making inquiry of its customer. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

Although a bank does not have to pay on a stale check, it may make payment thereon in good faith, and bank was not liable to depositor for making payment on stale check presented 13 months after date of issue and after expiration of order to stop payment. *Granite Equip. Leasing Corp. v. Hempstead Bank*, 68 Misc. 2d 350 (1971).

In an action by insurance company, as subrogee of bank, for funds paid on two checks, payment of which had been stopped verbally, but which stop payment order had not been confirmed in writing, and which checks were paid more than 14

days after receipt of stop order, bank having credited payee with the amount paid, insurer stood in the shoes of bank and could not recover against payee of the checks in absence of evidence of unjust enrichment. *Commercial Ins. Co. v. Scalmandre*, 56 Misc. 2d 628 (1967).

The instant section was adopted for the protection of banks and plainly does not have the effect of extinguishing a valid obligation merely because it is more than six months past due. Such a holding would create an extremely short statute of limitations where none was intended by the legislature. *Hartsook v. Owens*, 236 Ark. 790, 370 S.W.2d 69 (1963).

An action may be brought against a debtor's estate on a debt represented by a check even though the check is more than six months old. *Hartsook v. Owens*, 236 Ark. 790, 370 S.W.2d 69 (1963).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 471 et seq.

11 Am. Jur. 2d, Banks § 899.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:321-

4:324 (Relationship between payor bank and customer; stale checks).

CJS. 9 C.J.S., Banks and Banking §§ 328-332, 337, 341, 351, 357, 358, 405.

§ 75-4-405. Death or incompetence of customer.

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for ten (10) days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

SOURCES: Codes, 1942, § 41A:4-405; Laws, 1966, ch. 316, § 4-405; Laws, 1992, ch. 420, § 105, eff from and after January 1, 1993.

Cross References — Deposit of minors, see § 81-5-59.

Death of drawer of check, see § 81-5-63.

JUDICIAL DECISIONS

1. In general.

Where (1) check, drawn on December 3, 1973 on account with insufficient funds by drawer of apparently unstable mind, was dishonored before drawer's death by branch office of defendant bank, (2) payee re-presented check at defendant's main office, and teller who cashed it violated defendant's rule about cashing checks for more than \$500 without obtaining manager's approval, (3) drawer's attorney requested defendant to place "hold" order on drawer's account, and two such orders were entered on December 5 and 6, 1973, and (4) on drawer's death, defendant set off amount of check against certificate of deposit held by drawer with defendant, and defendant's estate sought to recover such sum, court held (1) that since check was properly payable on its face and otherwise, defendant under UCC § 4-401(1) had right to charge it against drawer's account, even though such charge created overdraft, (2) teller's violation of rule about cashing checks could not be invoked for benefit of estate, since it was internal bank rule only, (3) prior dishonor of check did not affect defendant's right to pay it on later presentment, and (4) under UCC § 4-405(1), "hold" orders of drawer's attorney on drawer's account were not effective, since drawer had not been adjudicated to be an incompetent. *Lincoln Nat'l Bank & Trust Co. v. Peoples Trust Bank*, 177 Ind. App. 312, 379 N.E.2d 527 (1978).

In action by administratrix against bank for improperly paying check drawn by decedent, where evidence showed that check was drawn on May 14, 1974 and that defendant was payee thereof; that decedent died on May 30, 1974; that defendant received check from another bank on June 3, 1974 and paid it on June 4, 1974; and that plaintiff on May 31, 1974 informed officer of defendant only about fact of decedent's death, judgment was properly entered for defendant because (1) plaintiff, at time of informing defendant about decedent's death, did not order defendant to stop payment on check as required by UCC § 4-405(2); and (2) UCC § 4-405(2) applied to defendant both as payor bank and also as payee-holder of

check. *Cirar v. Bank of Hartshorne*, 567 P.2d 96 (Okla. 1977).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son, since drawee bank was not authorized to pay check under UCC § 4-405 more than 10 days after drawer's death, if it knew of fact of death, presentment to bank was entirely excused under UCC § 3-511(2) as futile gesture and provision for direct payment merely restated result prescribed by law in accord with UCC §§ 3-413(2) and 3-507(1) (b). *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

Where check given in payment for debt was returned by drawee bank for insufficient funds and not because of drawer's death under UCC § 4-405, debt still existed and payee properly stated cause of action for such debt against decedent drawer's estate. *Anderson v. Merriott*, 550 P.2d 1320 (Okla. 1976).

Executor of estate of drawer of two checks was entitled to recover amount received by holder of checks when he cashed them two days after death of drawer; UCC § 4-405 applied only to liability of bank for payment of check and was not intended to change relationship between personal representative and persons having claims against estate. *Black v. Hart*, 301 So. 2d 787 (Fla. App. 1974).

UCC § 4-405 codifies pre-Code rule that payment of check by bank after death of maker was valid when made in good faith without knowledge of death; held, payment cannot be recovered by estate of maker. In *re Schenck's Estate*, 63 Misc. 2d 721 (1970).

UCC § 4-405 is inapplicable to wrongful dishonor action where decedent's niece requested withdrawal of funds from joint and survivorship account in name of uncle and wife, where niece's proffered power of attorney from decedent was broad and general, and where proffered power of

attorney was not presented with signed withdrawal slip as required under withdrawal rules. *Beucar v. Bristol Fed. Sav. & Loan Ass'n*, 6 Conn. Cir. Ct. 148, 268 A.2d 679 (1969).

A check revoked by the death of the drawer may in a proper action be used as evidence in support of the payee's claim of indebtedness against the decedent, but not as evidence of the indebtedness itself. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

A declaration filed by the original payee against the administrator of the deceased drawer's estate for payment of the check

does not state a cause of action where the order which the check represented has been revoked under the provisions of this section, for under Georgia law a check in the hands of the original payee does not constitute a debt for which a decedent's estate would be liable. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

Although the death of the maker of a check does not terminate his liability upon the instrument it does operate to revoke the authority of the payee to collect from the drawee bank. *In re Greene's Estate*, 47 Misc. 2d 140 (1965).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 894, 961.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:331-4:337 (Relationship between payor bank and customer; death or incompetency of customer).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2341 et seq. (Payment of item on death or incompetence of customer).

CJS. 9 C.J.S., Banks and Banking §§ 326-332, 337, 341, 351-358, 405.

§ 75-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven (7) years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because of a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty (30) days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 75-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

SOURCES: Codes, 1942, § 41A:4-406; Laws, 1966, ch. 316, § 4-406; Laws, 1992, ch. 420, § 106, eff from and after January 1, 1993.

Cross References — Unauthorized signatures generally, see § 75-3-403.

Indorsement in name of named payee, when effective, see § 75-3-405.

Negligence contributing to alteration or to unauthorized signature, see § 75-3-406.

Warranties on presentment or transfer, see § 75-3-417.

Warranties of customer or collecting bank, see § 75-4-207.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

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| 1. In general; construction with other code sections. | 6. Bank's defenses. |
| 2. Customer's duties; examination. | 7. —Burden of proof. |
| 3. —Examination; timelines. | 8. —Same wrongdoer. |
| 4. Notice. | 9. —Waiver. |
| 5. —Notice; timeliness. | 10. Bank's negligence; standard of care. |
| | 11. —Standard of care; reasonable commercial standards. |
| | 12. —Burden of proof. |
| | 13. —Negligence barring defenses. |

14. —No negligence found.
15. Limitation periods.
16. —One year.
17. —Three years.
18. —Commencement of period.

B. Pre-Uniform Commercial Code
Decisions.

19. In general.

A. Decisions Under Uniform
Commercial Code.

1. In general; construction with other code sections.

UCC § 4-406(4) applies only to actions based on warranties set forth in the Uniform Commercial Code and is inapplicable to negligence actions. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

UCC § 3-406 and § 4-406(2) merely preclude a person who was negligent prior to (UCC § 3-406) or after (UCC § 4-406) a check transaction from asserting an unauthorized signature or alteration against the bank. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978) (where customer, instead of asserting unauthorized signature or alteration against bank, sued bank on theory that it had negligently permitted customer's accountant to divert proceeds of checks drawn by customer).

Even though under UCC § 4-406, drawer could not recover for unauthorized signature or any alteration after lapse of 60 days, UCC § 4-406 did not apply to recovery under UCC § 4-403 for payment in contravention of binding stop payment order and drawer had right to recover as matter of law under UCC § 4-403, where written stop payment order was sent to and received by bank so as to afford bank reasonable time to act, bank paid checks in contravention of order within six months, payments were made to persons not authorized to receive payments, and, as a result, drawer suffered loss. *Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co.*, 137 Ga. App. 521, 224 S.E.2d 498 (1976).

2. Customer's duties; examination.

Under UCC § 4-406(4), dealing with customer's duty to discover and report

alteration of check within one year, a new one-year period begins to run with each altered check. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature...on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. *Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 530 S.W.2d 743 (Mo. Ct. App. 1975).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

3. —Examination; timelines.

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defen-

dant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4); and such issue was one of fact. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

Nowhere does the Uniform commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrong doing, but only if the payor is a holder in due course or paid

"in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrong doing, back to the bank under § 4-406(3). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

The failure of a depositor to examine its cancelled checks and statements for a period of 18 months, thereby permitting a series of substantial forgeries to go undetected, would under paragraphs 1, 2, and 3 of this section make the depositor, rather than the bank, liable for the losses incurred, and this was the rule in Kentucky prior to the UCC. *Wuest Bros. v. Liberty Nat'l Bank & Trust Co.*, 388 S.W.2d 364 (Ky. 1965).

4. Notice.

The report of forgery to the bank that is required by UCC § 4-406(4) need not be in the form of the customary affidavit of forgeries or in the form of any other notice. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defendant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that

defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4), and such issue was one of fact. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

The notice of forgery may be oral. *Duralite Co. v. New Jersey Bank & Trust Co.*, 97 N.J. Super. 48, 234 A.2d 247 (App. Div. 1967).

5. —Notice; timeliness.

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who

in good faith pays" under UCC § 3-417(1) it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negli-

gence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

UCC § 4-406(4) places an absolute time limit on the right of a customer to make a claim for the payment of altered or forged instruments. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

Depository bank that collected check bearing forged endorsement was liable to collecting bank on its warranty of good title and guarantee of prior endorsements under UCC § 4-207(1), and collecting bank was similarly liable to drawee bank, notwithstanding drawer delayed 6 months in notifying drawee of suspected forgery; assuming drawer's delay in notifying drawee of suspected forgery was unreasonable under UCC § 4-406, depository bank was not discharged from liability for breach of warranty of good title under UCC § 4-207(4) absent evidence that any party sustained loss caused by delay. *Michigan Nat'l Bank v. American Nat'l Bank & Trust Co.*, 34 Ill. App. 3d 30, 339 N.E.2d 375 (1st Dist. 1975).

Code § 4-406 did not preclude claim against drawee bank for payment of check upon unauthorized endorsement, where evidence indicated that drawer acted with reasonable promptness upon learning that payee had not received check, and drawee bank had not established that it suffered any loss by reason of drawer's 60-day delay in making demand upon bank for reimbursement. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

6. Bank's defenses.

General pattern of UCC §§ 3-406 and 4-406 is to absolve payor bank, which has been deceived by third party, from liability to its customer if customer's negligence

played substantial part in making deception possible; however, bank is absolved from liability only if it has acted with reasonable care or in accordance with reasonable banking standards. *Transamerica Ins. Co. v. United States Nat'l Bank*, 276 Or. 945, 558 P.2d 328 (1976).

Depositor was guilty of negligence which precluded her from holding bank liable on forged checks where trusted employee of customer forged checks and directed bank to send customer's bank statements to post office box in name of employee and customer did not receive any bank statements for 26 months, during which time there were several overdrafts on account which made customer suspicious but about which she did not do anything other than to make additional deposits to overcome overdrafts. *Westport Bank & Trust Co. v. Lodge*, 164 Conn. 604, 325 A.2d 222 (1973).

7. —Burden of proof.

Where depository bank improperly encoded check issued in amount of \$45 to read \$10,045, check was forwarded for collection, paid and amount of \$10,045 deducted from customer's account, payor bank was required to reimburse customer for wrongful payment, notwithstanding payor bank sent statement to customer which provided that account would be considered correct and checks genuine if no error was reported within ten days and customer did not examine cancelled check when it was received and did not report error for seven and one-half months: there was no showing that customer's delay in giving notice caused loss greater than bank sustained when it paid improperly encoded check and, in addition, UCC § 4-406 which applies to forged or altered checks provides that one year is proper period in which to notify bank of forged or altered checks thus, in effect, establishing one year as length of time deemed to be reasonable under circumstances of present case. *State ex rel. Gabalac v. Firestone Bank*, 46 Ohio App. 2d 124, 346 N.E.2d 326 (1975).

8. —Same wrongdoer.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract be-

tween union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's fund, rather than union's funds, under common-law doctrine of *Price v. Neal* (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based). *United States v. Pavloski*, 574 F.2d 933 (7th Cir. Wis. 1978).

Where the trusted employee of the drawer is the forger, the employer is not barred because the employer relied on the trusted employee where the circumstances are such that this reliance was reasonably justified and the bank statements and cancelled checks were sent to this same employee. *Jackson v. First Nat'l Bank, Inc.*, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

9. —Waiver.

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genu-

ineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

Where copayee obtained check, drawn to himself and automobile dealer, from drawer-lender, by misrepresenting that he was purchasing automobile, and by forging copayee's indorsement obtained payment from collecting bank, which forwarded check to drawee bank, which paid check to collecting bank and charged drawee's account, but credited drawee's account upon learning of forged indorsement, there was presented no such negligence of drawer, within meaning of § 3-406, as would preclude drawer from asserting forgery against drawee, so that drawer's failure to assert such defense would not preclude drawee bank under § 4-406(5) from prosecuting its claim against collecting bank. *East Gadsden Bank v. First City Nat'l Bank*, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Payor bank which made final payment of check drawn on fictitious account, instead of returning check or giving notice of dishonor within time prescribed by Code, was not entitled to recover amount of erroneous payment from indorser. *Samples v. Trust Co.*, 118 Ga. App. 307, 163 S.E.2d 325 (1968).

10. Bank's negligence; standard of care.

UCC § 3-406 and § 4-406(2) preclude recovery by customer from bank only if bank paid instrument in accordance with reasonable commercial standards (see UCC § 3-406) or ordinary care (see UCC § 4-406(3)). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978) (holding that since bank was negligent as a matter of law in paying

checks presented by customer's accountant and thereby permitting accountant to divert proceeds of checks to his own use, bank could not claim benefit of either UCC § 3-406 or § 4-406(2)).

Where (1) accountant, who was not authorized to sign checks on behalf of plaintiff corporation or to make deposits into any account other than plaintiff's tax and loan account with defendant bank, presented over a period of time a total of eleven checks to defendant which were signed by plaintiff's president, made payable to defendant, and intended to be deposited into plaintiff's tax and loan account, (2) some of such checks were signed in blank by plaintiff's president and filled in by accountant, which he had authority to do, (3) defendant knew about limitation on accountant's authority, but nevertheless permitted accountant on several occasions to deposit part of a check's proceeds into tax and loan account and remainder into either accountant's personal account or some other account, (4) defendant also allowed accountant to purchase cashier's check with proceeds of one check and to have it made payable to payee designated by accountant, and (5) defendant never required accountant to indorse checks presented or made any inquiry into his authority to use plaintiff's funds in unauthorized manner, court held (1) that defendant had been negligent as a matter of law in dealing with plaintiff's funds, (2) that although Uniform Commercial Code does not expressly state that bank is liable for negligently paying item, bank must nevertheless use ordinary care in disbursing depositor's funds, (3) that reasonableness of defendant bank's conduct could be assessed in light of plaintiff's conduct, (4) that under pre-code rule not displaced by UCC, where check is drawn to order of bank to which drawer is not indebted, bank (a) is authorized to pay proceeds only to persons specified by drawer, (b) takes risk in treating check as payable to bearer, and (c) is placed on inquiry as to authority of drawer's agent to receive payment himself, (5) that if drawer clothes agent with apparent authority to receive proceeds of check made payable to bank's order, bank is not liable to drawer for paying proceeds to agent or applying pro-

ceeds in manner specified by agent contrary to his actual authority, (6) that in present case, defendant, as a matter of law, had breached contract implied in normal banking relationship with plaintiff and thus had been negligent in its treatment of plaintiff's funds, (7) that plaintiff had not been aware of defendant's conduct in allowing accountant to divert part of proceeds of plaintiff's checks to accountant's use, (8) that plaintiff had not knowingly assented to defendant's practice of treating checks payable to defendant's order as bearer paper if both drawer and bearer were known to defendant's teller, (9) that defendant's negligence in disbursing plaintiff's funds also could not be successfully defended, either under either UCC § 3-406 (dealing with negligence contributing to alteration or unauthorized signature) or UCC § 4-406 (dealing with customer's duty to discover and report unauthorized signature or alteration), on ground that plaintiff had been negligent in signing some checks in blank and not checking accountant's examination of plaintiff's monthly bank statements, since defendant had been negligent as a matter of law in paying proceeds of checks to accountant, and (10) that UCC § 3-406 and § 4-406(2) and (4) were also inapplicable because plaintiff was not asserting unauthorized signature or alteration against defendant. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

The question whether a bank was negligent in paying an item—that is, whether it paid the item in accordance with reasonable commercial standards under UCC § 3-406 and § 4-406—is one that must be decided on the facts of each particular case. The reasonableness of the bank's conduct, of course, may be assessed in light of the plaintiff's conduct. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Corporation failed to establish lack of ordinary care by bank where bank assigned clerk, who was responsible for approximately 200 accounts and who examined all checks from each account daily, comparing signatures on checks with memorization of signature on customer's signature card, where forgeries were suf-

ficiently adroit so as to escape detection by such methods, and where method used by bank was substantially same as that employed by other commercial banks in area. On other hand, customer did establish bank's lack of ordinary care with respect to altered checks where alterations were so maladroitly performed that they should have been readily discovered. *Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 530 S.W.2d 743 (Mo. Ct. App. 1975).

Where employee of drawer-drawee bank caused checks to be issued to order of payee bank and where payee bank, without inquiry, deposited checks to personal account of employee, who subsequently absconded with funds, drawee bank was chargeable with exercising same degree of care and control of its accounts that individual depositor would have been expected to exercise under UCC § 4-406. *Federal Ins. Co. v. Groveland State Bank*, 37 N.Y.2d 252, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Bank which fails to use ordinary care in making payment cannot escape liability through reliance on its customer's failure to perform his post-payment duties. *Taylor v. Equitable Trust Co.*, 269 Md. 149, 304 A.2d 838 (1973).

If the customer's evidence that convinced the jury that the bank exhibited a lack of ordinary care in paying the forged checks, then the failure of the customer to exercise reasonable care in examining the statements and checks and notifying the bank of the forgeries would not preclude the customer from asserting the unauthorized signatures on the checks and the bank's breach of its agreement with the customer. *Hardex-Steubenville Corp. v. Western Pa. Nat'l Bank*, 446 Pa. 446, 285 A.2d 874 (1971).

11. —Standard of care; reasonable commercial standards.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "les-

sees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Bank customer that permits its bookkeeper to prepare checks and to balance

customer's bank statements without any supervision does not exercise reasonable care within meaning of UCC § 4-406(1) and is therefore precluded by UCC § 4-406(2)(a) and (b) from asserting against bank forgeries by bookkeeper on other items paid by bank in good faith after initial forged item was available to the customer for period of not more than 14 days. In such case, knowledge of customer's dishonest employee is charged to customer for purpose of determining when first item and statement became "available" to customer within meaning of UCC § 4-406(2)(b). However, the preclusion of UCC § 4-406(2) is made inapplicable by UCC § 4-406(3) if customer can establish that bank failed to use ordinary care in paying first forged item. *George Whalley Co. v. National City Bank*, 55 Ohio App. 2d 205, 380 N.E.2d 742 (1977) (holding that customer was precluded from asserting unauthorized signature on items paid by bank after 14 days following customer's receipt of bank statement, that customer failed to establish bank's lack of ordinary care in cashing first check forged by customer's employee, and that evidence supported trial court's judgment that bank was only liable for three forged items charged to customer during 14-day period following customer's receipt of bank statement).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with

reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

A negligent depositor is not precluded from asserting a claim if he establishes that the bank's payment of forged checks was not in accordance with reasonable commercial standards. *Exchange Bank & Trust Co. v. Kidwell Constr. Co.*, 472 S.W.2d 117 (Tex. 1971).

12. —Burden of proof.

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature...on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. *Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 530 S.W.2d 743 (Mo. Ct. App. 1975).

Lack of ordinary care on part of drawee bank in paying items containing unauthorized signatures may be established by proof either that bank's procedures were below standard or that bank's employees failed to exercise care in processing items. *First Nat'l Bank & Trust Co. v. Cutright*, 189 Neb. 805, 205 N.W.2d 542 (1973).

The former rule in Wisconsin that a bank must prove itself free of negligence in charging forged checks against its depositor's account has been changed by subdivision (3) of this section which imposes upon the depositor a burden of establishing a bank's negligence. *Huber Glass Co. v. First Nat'l Bank*, 29 Wis. 2d 106, 138 N.W.2d 157 (1965).

13. —Negligence barring defenses.

Bank was precluded from using defense that customer did not promptly notify bank of unauthorized signature after statements were available to customer, where evidence showed lack of care on

part of bank in paying checks signed by unauthorized person. *First Nat'l Bank v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970).

Bank which paid forged checks drawn on the trust account of a church and payable to the order of the forger, many of which checks bore the endorsement of a company operating a race track, was put on inquiry as to whether the sums represented by the checks were being withdrawn for unauthorized purposes, and was guilty of negligence for failing to inquire. *Jackson v. First Nat'l Bank, Inc.*, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

14. —No negligence found.

Finding that bank had not been negligent in paying checks on which depositor's signature as drawer had been forged by depositor's bookkeeper, and that bank in defending suit by depositor could therefore utilize affirmative defenses afforded by UCC § 3-406 and UCC § 4-406, would not be upset on appeal where such finding was supported by substantial evidence in record. *Parsons Travel, Inc. v. Hoag*, 18 Wash. App. 588, 570 P.2d 445 (1977).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared nowhere on instruments; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. *Federal Ins. Co. v. Groveland State Bank*, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Position that bank had acted in good faith and with ordinary care was supported by testimony in record that bank had cashed no checks not bearing names of both plaintiffs, that tellers had checked the signatures against the formal signature card until they were familiar with plaintiff and with the signatures, and that the forgeries were so skillful as to escape detection. *Terry v. Puget Sound Nat'l Bank*, 80 Wash. 2d 157, 492 P.2d 534 (1972).

A bank is not negligent in exchanging its cashier's check made out to a named payee for a personal check drawn by its customer to the same payee and bearing a forged endorsement. *Society Nat'l Bank v. Capital Nat'l Bank*, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

15. Limitation periods.

The one-year period from the receipt of the bank statement within which a bank customer must "discover and report his unauthorized signature or any alteration of the face of or back of the item" and the three-year period within which a customer must "discover and report any unauthorized indorsement" or be "precluded from asserting against the bank such unauthorized signature or indorsement" (Uniform Commercial Code, § 4-406, subd [4]) are not Statutes of Limitations but are instead conditions precedent to asserting a claim against the bank for honoring an unauthorized signature so that a breach of contract action based upon defendant bank's cashing of forged checks drawn on plaintiff's account commenced within the six-year time period (CPLR 213, subd 2) would be barred if no "report" were given. Since the statute does not describe the form of the "report" of forgery to the bank, there being no requirement that the "report" be in the form of a "customary affidavit of forgeries or any other notice", a question of fact remains as to whether plaintiff's complaints to defendant of "unexplained overdrafts" constituted a "report" of the forgeries, sufficient to defeat defendant's motion for summary judgment. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

In action against collecting bank by payee of check which had been stolen by

thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

16. —One year.

Where depository bank improperly encoded check issued in amount of \$45 to read \$10,045, check was forwarded for collection, paid and amount of \$10,045 deducted from customer's account, payor bank was required to reimburse customer for wrongful payment, notwithstanding payor bank sent statement to customer which provided that account would be considered correct and checks genuine if no error was reported within ten days and customer did not examine cancelled check when it was received and did not report error for seven and one-half months: there was no showing that customer's delay in giving notice caused loss greater than bank sustained when it paid improperly encoded check and, in addition, UCC § 4-406 which applies to forged or altered checks provides that one year is proper period in which to notify bank of forged or altered checks thus, in effect, establishing one year as length of time deemed to be reasonable under circumstances of present case. *State ex rel. Gabalac v. Firestone Bank*, 46 Ohio App. 2d 124, 346 N.E.2d 326 (1975).

In action by trustees of trust fund against bank to recover for funds allegedly withdrawn from trust fund bank account by one trustee, with approval and consent of bank, in violation of trust and without proper authority, checks drawn on trust fund checking account and signed by one trustee were paid on unauthorized signatures under UCC § 4-406 where autho-

rized signature of trust fund required joint signatures of three trustees; thus, trustees' action against bank was barred since items on which complaint was based were paid by bank on unauthorized signatures, one year statutory period of UCC § 4-406(4) applied to liability of bank and suit was not filed for more than three years thereafter. *Pine Bluff Nat'l Bank v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

If item meets test of being forged on both face and back, depositor can only rely on forgery on face of item if he notifies bank within 60 days after instrument is made available for his examination, but he can still rely on forged indorsement on back of item as basis for unauthorized payment if he gives notice within applicable one year period; held, trial court did not err in refusing to grant summary judgment to defendant-bank limiting liability on unauthorized payments from plaintiff's account where it could not be said, as matter of law, that bank had paid items solely on account of forgeries on face of items. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

Suit in California by drawer on contract principles is barred by one-year statute of limitations, whether brought against drawee bank, collecting bank, or depository bank. *Allied Concord Fin. Corp. v. Bank of Am.*, 275 Cal. App. 2d 1 (2d Dist. 1969).

Subsection (4) of § 4-406 of the Georgia Uniform Commercial Code, while carry-

ing forward the one-year limitation, modifies somewhat a statute providing that no bank which has paid in good faith a check bearing a forged or unauthorized indorsement shall be liable to any person for such payment unless within one year after payment the drawer of the check or some subsequent indorser or holder thereof shall notify the bank in writing that the check bore a forged or unauthorized indorsement. *Indemnity Ins. Co. of N. Am. v. Fulton Nat'l Bank*, 108 Ga. App. 356, 133 S.E.2d 43 (1963).

17. —Three years.

Depositor did not give notice of forged endorsements within 3 years of his receipt of statement of account accompanied by cancelled checks; held, depositor's claim for wrongful dishonor was barred. *Billings v. East River Sav. Bank*, 33 A.D.2d 997 (1st Dep't 1970).

18. —Commencement of period.

In action to recover losses incurred when bank paid forged checks which had been drawn on plaintiffs' account by their bookkeeper, there was no triable issue of fact, and, thus, trial court properly granted bank's motion for partial summary judgment, excluding recovery on all forged checks which had been paid and returned more than one year prior to filing of complaint, pursuant to California version of UCC § 4-406, providing that action against bank must be brought within one year after bank mailed to its customer statements of account accompanied by items paid in good faith, where there was neither allegation, nor any evidence, that bank acted dishonestly or that items had not been paid in good faith. Period of limitations for each check began running when bank mailed statements of account and items paid to plaintiffs pursuant to § 4-406, and not when plaintiffs received statements of account from bank. Section 4-406 placed burden upon bank customer to examine statements regularly and discover any forgery or alterations on any item included therein so long as bank met its duty of making available statement of account and items paid to customer. The fact that employee of bank's customer con-

cealed forgery did not obviate customer's responsibility to examine his own bank statements. *Kiernan v. Union Bank*, 55 Cal. App. 3d 111 (1st Dist. 1976).

Where bank honored checks drawn on joint venture account, although checks did not carry required signature of one of two joint venturers, absence of one of two or more necessary signatures did not constitute "unauthorized signature" within meaning of UCC § 4-406 and, thus, action against bank to recover for improper payment of checks, commenced more than one year after statement of account was sent to joint venturers, was not barred by UCC § 4-406(4). *G & R Corp. v. American Sec. & Trust Co.*, 523 F.2d 1164, 173 U.S. App. D.C. 215 (1975) (applying District of Columbia law).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

An action begun against a bank more than a year after notice was given of forgeries is barred by the statute of limitations. *Duralite Co. v. New Jersey Bank & Trust Co.*, 97 N.J. Super. 48, 234 A.2d 247 (App. Div. 1967).

B. Pre-Uniform Commercial Code Decisions.

19. In general.

This statute does not apply to a depositor's action against a bank for negligently cashing checks drawn by an unauthorized person. *Commercial Nat'l Bank & Trust Co. v. Hughes*, 243 Miss. 252, 137 So. 2d 800 (1962).

RESEARCH REFERENCES

ALR. Construction and effect of statutes relieving bank from liability to depositor for payment of forged or raised check unless within specified time after the return of voucher representing payment he notifies bank as to forgery or raising. 50 A.L.R.2d 1115.

Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered. 75 A.L.R.2d 611.

Bank's liability for payment or withdrawal on less than required number of signatures. 7 A.L.R.4th 655.

Construction and application of UCC § 4-406, requiring customer to discover and report unauthorized signature, in cases involving bank's payment of check

or withdrawal on less than required number of signatures. 7 A.L.R.4th 1111.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

Am Jur. 11 Am. Jur. 2d, Banks §§ 895, 913 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:351-4:365 (Relationship between payor bank and customer; unauthorized signature or alteration; customer's duty).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2351 et seq. (Duty of customer to discover and report unauthorized signature or alteration).

CJS. 9 C.J.S., Banks and Banking §§ 278, 327-329, 349, 356, 417, 418, 424, 434, 435, 437, 458.

§ 75-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

(1) Of any holder in due course on the item against the drawer or maker;

(2) Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(3) Of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

SOURCES: Codes, 1942, § 41A:4-407; Laws, 1966, ch. 316, § 4-407; Laws, 1992, ch. 420, § 107, eff from and after January 1, 1993.

Cross References — Stop payment orders, see § 75-4-403.

JUDICIAL DECISIONS

1. In general.

Plaintiff bank, which paid the buyer's \$19,500 check to the seller over the buyer's stop payment order (Uniform Commercial Code, § 4-403), and then, follow-

ing a settlement of the dispute over the delivery of defective machinery between the buyer and the seller, agreed to accept \$5,000 from the seller in discharge of the seller's obligation to it, thereby relin-

quishing its rights to proceed in subrogation against the seller, is subrogated to the seller's right against the buyer "under the transaction" to be paid for the merchandise delivered, less \$5,000 and undiminished by the settlement, and is additionally entitled to recover from the buyer to the extent that the buyer has been unjustly enriched in the transaction and settlement with the seller (Uniform Commercial Code, § 4-407); the amount to which plaintiff shall be entitled is the greater of the amount by which the buyer was unjustly enriched by payment of the check or the extent to which the seller was entitled to payment from the buyer when the check was issued, in no event exceeding \$14,500 and interest. *Manufacturers Hanover Trust Co. v. AVA Indus., Inc.*, 98 Misc. 2d 614 (1978).

Plaintiff payor bank, which made payment of a check with a forged drawer's signature, and which is therefore bound by its payment if no warranties are applicable or if defendant, the prior indorser, was a holder in due course or a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), may not, on a motion for summary judgment, recover such payment from defendant pursuant to the warranty given by a customer of a payor bank with respect to the drawer's signature (Uniform Commercial Code, § 4-207, subd [1], par [b]) since triable questions of fact exist as to whether defendant had knowledge of the forgery, was a holder in due course or a person who in good faith changed his position in reliance on plaintiff's payment. Plaintiff's position is not improved by subrogation to the drawer's rights (Uniform Commercial Code, § 4-407, subd [c]) since a drawer's rights against a holder who has obtained payment of a check with a forged drawer's signature are even fewer than those of the payor bank, the limited warranty of section 4-207 (subd [1], par [b]) not being given to the drawer with respect to the drawer's own signature by any customer that is a holder in due course and acts in good faith. *Marine Midland Bank v. UMBER*, 96 Misc. 2d 835 (1978).

Under UCC § 3-116(b), unless a check payable to the order of two or more payees

is in the alternative, a bank can accept and pay it only on the indorsement of all payees. *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), on remand, 146 Ga. App. 825, 247 S.E.2d 542 (1978) (case involving payment of check, jointly payable to both subcontractor and materialman, without obtaining materialman's indorsement, wherein court also stated that subrogation rights granted by UCC § 4-407(c) to payor bank could not be used to defeat materialman's claim, and that court of appeals correctly held that both collecting and drawee banks were liable to materialman as a matter of law).

UCC § 4-403(3) and § 4-407 may present a question as to who has the ultimate burden of proof as to the loss caused to a bank's customer by the bank's violation of a valid stop-payment order on a check. The better rule is to place the ultimate burden of proof of loss on the customer. Initially, the customer establishes a prima-facie case when he shows that the bank paid a check contrary to a valid stop-payment order. Thereupon, the bank, exercising its subrogation rights under UCC § 4-407, has the burden of coming forward and presenting evidence of an absence of actual loss to the customer. When the bank meets the burden of coming forward with such evidence, the customer must then sustain the ultimate burden of proof. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Since bank which violates valid stop-payment order on check is subrogated under UCC § 4-407(b) to rights of payee against drawer to prevent any unjust enrichment of drawer, it makes little sense to define term "loss," as used in UCC § 4-403(3), to mean amount of check paid by bank when UCC § 4-407(b) gives bank possible subrogation claims against drawer which would reduce amount for which bank might be held liable to drawer. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Where checks were dishonored but were not returned within time limits prescribed by UCC § 4-302, payor bank was liable to payees for face amount of checks less any

payments received with respect thereto, notwithstanding payor bank's claim that due to short period of time between dishonor and drawer's bankruptcy, payees would have been unable, assuming timely return, to have obtained judgment against drawer, or even assuming payment, payees would not have been able to retain monies received since payment would represent voidable preference as against drawer's other creditors. Furthermore, payor bank failed to establish any right of subrogation under UCC § 4-407 and, thus, was not entitled to assert against payees any claims which might exist in favor of drawer of checks. *Met Frozen Food Corp. v. National Bank of N. Am.*, 89 Misc. 2d 1033 (1977).

Where check made out to payee for purchase of rug was cashed by bank after stop payment order had been entered on check in question, bank was liable to drawer for amount of check, absent any showing by bank of lesser loss or nonloss on part of drawer. *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284 (1976).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, president, rather than corpo-

ration, was drawer for purposes of UCC § 4-407 which, inter alia, subrogates payor bank to rights of drawer or maker against its payee, where, under UCC § 3-403(2), president, by not signing in representative capacity, became personally liable in place of corporation, and where bank had actual notice that agent's signature was not enough to bind corporation. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

Where corporate check, which was payable to plaintiff and was made out by her dying husband on corporate account, was deposited in her account in same bank on which check was drawn, and plaintiff's stepson, acting for corporation, stopped payment on check, but bank did not charge back and reverse plaintiff's provisional credit before midnight of banking day following receipt or send written notice until seven days later, plaintiff had absolute right to draw upon funds, and payment of item had become final by passage of time. However, bank was subrogated to corporate drawer's rights against plaintiff notwithstanding fact that bank never debited corporate account and fact that trial court granted summary judgment in favor of corporate drawer against bank, which was final and nonvacatable, thus preventing corporate drawer from suffering any loss. *Sunshine v. Bankers Trust Co.*, 34 N.Y.2d 404, 314 N.E.2d 860 (1974).

Payor bank which did not pay or return check and did not send notice of dishonor until after midnight deadline was liable to payee for full amount of check; however, bank was apparently entitled to subrogation under UCC § 4-407. *AH-RS Coal Corp. v. Farmers Nat'l Bank*, 63 Pa. D. & C.2d 203 (1973).

Bank which failed to honor "stop payment" order and subsequently reimburse drawers of check was required as subrogee of drawers in action against payee to prove that drawers would have been entitled to recover from payee had check been paid or, conversely, had check not been paid, that drawers would have had valid defense to claim by payee. *First Nat'l Bank v. Heatherly*, 8 Ill. App. 3d 1073, 291 N.E.2d 280 (5th Dist. 1972).

By this section the Legislature intended to grant to a payor bank which had mis-

takenly paid an item over the stop-payment order of the drawer or maker, a full and effective remedy by way of subrogation to the rights and remedies of the drawer or maker against the payee as well as those who have, by their tortious acts in concert with him, combined to produce the single indivisible result, such remedy being furnished not only to prevent unjust enrichment but also to the extent necessary to prevent loss to the bank by reason of its payment of the item. There is no requirement that all of the defendants who may be joined in the action be "unjustly enriched". *South Shore Nat'l Bank v. Donner*, 104 N.J. Super. 169, 249 A.2d 25 (L. Div. 1969).

In an action by insurance company, as subrogee of bank for funds paid on two checks, payment of which had been stopped verbally, but which stop payment order had not been confirmed in writing, and which checks were paid more than 14 days after receipt of stop order, bank having credited payee with the amount paid, insurer stood in the shoes of bank and could not recover against payee of the checks in absence of evidence of unjust enrichment. *Commercial Ins. Co. v. Scalmandre*, 56 Misc. 2d 628 (1967).

The provisions of UCC § 4-407 are not limited to the case of payment in disre-

gard of a stop-payment order but extends to any improper payment and therefore applies when a postdated check is paid before its date arrives. *Peck v. Franklin Nat'l Bank*, 4 U.C.C. Rep. Serv. 861 (N.Y. App. Term 1967).

A depository bank which honored checks presented to it by a collecting bank which was a holder in due course, over its customer's stop payment order, and debited the amount of the checks from its customer's account, was not liable to its customer either because it was subrogated to the rights of the collecting bankholder in due course, or because the customer did not bear its burden of showing that it suffered loss from the depository bank's disregard of the stop payment order. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

A bank depositor who executed a "Request to Stop Payment of Check," in which he released the bank from liability in paying the check through "inadvertence, accident or oversight," could nevertheless recover the amount of the check from the bank because the agreement released the bank from liability for its negligence and was therefore void as against public policy. *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 905 et seq., 919 et seq., 937.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:381, 4:382 (Relationship between payor bank and customer; subrogation rights of bank).

18 Am. Jur. Legal Forms 2d, Uniform

Commercial Code: Article 4 — Bank Deposits and Collections, §§ 253:2361 et seq. (Right of payor bank to subrogation on improper payment).

CJS. 9 C.J.S., Banks and Banking §§ 326, 329, 336-340, 342, 349, 350, 353, 417, 418, 436, 442, 443.

83 C.J.S., Subrogation § 29.

PART 5.

COLLECTION OF DOCUMENTARY DRAFTS.

SEC.

- 75-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.
- 75-4-502. Presentment of "on arrival" drafts.

- 75-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.
- 75-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

§ 75-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

SOURCES: Codes, 1942, § 41A:4-501; Laws, 1966, ch. 316, § 4-501; Laws, 1992, ch. 420, § 108, eff from and after January 1, 1993.

Cross References — Collecting bank as agent or subagent of owner of item, see § 75-4-201.

Collecting bank using ordinary care, responsibility, see § 75-4-202.

Effect of instructions to collecting bank, see § 75-4-203.

Collection items, methods of sending and presenting, see 75-4-204.

Presentation, by written notice, of items not payable by, through or at bank, see § 75-4-212.

Letters of credit, use of credit in portions, relinquishment or reservation of claim to documents, see § 75-5-110.

Letters of credit, warranties on transfer and presentment of documentary draft or demand for payment, see § 75-5-111.

Letters of credit, time allowed for honor or rejection of documentary draft or demand for payment, see § 75-5-112.

Letters of credit, indemnity agreement to induce honor, negotiation or reimbursement, see § 75-5-113.

Limitations on acceptances, see § 81-5-89.

JUDICIAL DECISIONS

1. In general.

Collecting bank failed to comply with duties imposed on it by UCC §§ 4-501 and 4-503 and was therefore liable to payee of two documentary drafts where bank's customer, an automobile dealer, drew drafts on bank payable to payee, another automobile dealer, in payment for two automobiles which dealer purchased from payee, payee forwarded drafts to bank for collection, accompanied by titles to automobiles, where bank received drafts on October 30 and November 30, respectively, but

did not collect or return them until January, when they were returned unpaid, where, during that time, cars in question, represented by titles attached to drafts, were sold, encumbered and delivered to third parties, and where bank financed sales of automobiles to third parties without requiring any evidence of title to vehicles, and without payment of drafts which contained titles involved, as shown by records of bank. *Suttle Motor Corp. v. Citizens Bank*, 216 Va. 568, 221 S.E.2d 784 (1976).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 970, 976, 980, 986, 993.	draft; duty of presentment and notice of dishonor).
6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:393 (Instruction to jury; handling of documentary	CJS. 9 C.J.S., Banks and Banking §§ 382 et seq.

§ 75-4-502. Presentment of “on arrival” drafts.

If a draft or the relevant instructions require presentment “on arrival,” “when goods arrive” or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

SOURCES: Codes, 1942, § 41A:4-502; Laws, 1966, ch. 316, § 4-502; Laws, 1992, ch. 420, § 109, eff from and after January 1, 1993.

Cross References — Collecting bank using ordinary care, responsibility, see § 75-4-202.
Effect of instructions to collecting bank, see § 75-4-203.
Letters of credit, time allowed for honor or rejection of documentary draft or demand for payment, see § 75-5-112.
Limitations upon acceptances, see § 81-5-89.

JUDICIAL DECISIONS

A. Under Current Law.	
1.-5. [Reserved for future use.]	
B. Pre-Uniform Commercial Code Decisions.	
6. In general.	
A. Under Current Law.	
1.-5. [Reserved for future use.]	
B. Pre-Uniform Commercial Code Decisions.	
6. In general.	
Neither statute preventing for ninety-	six hours remission of proceeds of draft, nor attachment suit, converted collecting bank into trustee for forwarding bank or latter’s principal. <i>Love v. Fulton Iron Works</i> , 162 Miss. 890, 140 So. 528 (1932). Bank collecting drafts with bill of lading attached does not hold sums collected in trust. <i>Alexander County Nat’l Bank v. Conner</i> , 110 Miss. 653, 70 So. 827 (1916).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 980 et seq.	4:394 (Collection of documentary drafts).
6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:392,	CJS. 9 C.J.S., Banks and Banking § 414.

§ 75-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.

Unless otherwise instructed and except as provided in Chapter 5, a bank presenting a documentary draft:

(1) Must deliver the documents to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment; and

(2) Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee's services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions. However, the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses.

SOURCES: Codes, 1942, § 41A:4-503; Laws, 1966, ch. 316, § 4-503; Laws, 1992, ch. 420, § 110, eff from and after January 1, 1993.

Cross References — Drafts drawn under letters of credit, see §§ 75-5-109 to 75-5-114.

Privilege of presenting bank to deal with goods following dishonor of documentary draft, see § 75-4-504.

When sales documents deliverable on acceptance, when on payment, see § 75-2-514.

JUDICIAL DECISIONS

1. In general.

Collecting bank failed to comply with duties imposed on it by UCC §§ 4-501 and 4-503 and was therefore liable to payee of two documentary drafts where bank's customer, an automobile dealer, drew drafts on bank payable to payee, another automobile dealer, in payment for two automobiles which dealer purchased from payee, payee forwarded drafts to bank for collection, accompanied by titles to automobiles, where bank received drafts on October 30 and November 30, respectively, but

did not collect or return them until January, when they were returned unpaid, where, during that time, cars in question, represented by titles attached to drafts, were sold, encumbered and delivered to third parties, and where bank financed sales of automobiles to third parties without requiring any evidence of title to vehicles, and without payment of drafts which contained titles involved, as shown by records of bank. *Suttle Motor Corp. v. Citizens Bank*, 216 Va. 568, 221 S.E.2d 784 (1976).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 993, 996.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:391,

4:395-4:397 (Collection of documentary drafts). CJS. 9 C.J.S., Banks and Banking § 414.

§ 75-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a), the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

SOURCES: Codes, 1942, § 41A:4-504; Laws, 1966, ch. 316, § 4-504; Laws, 1992, ch. 420, § 111, eff from and after January 1, 1993.

Cross References — Enforcement of unpaid seller's lien, see § 75-2-706. Presenting bank's duties and obligations with respect to documents and goods, see § 75-4-503.

RESEARCH REFERENCES

<p>Am Jur. 10 Am. Jur. 2d, Banks § 857. 11 Am. Jur. 2d, Banks §§ 993-996. 6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:398, 4:399 (Collection of documentary drafts).</p>	<p>18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4-Bank Deposits and Collections, §§ 253:2381, 253:2382 (Privilege of presenting bank to deal with goods on dishonored documentary draft).</p>
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CHAPTER 4A

Uniform Commercial Code—Funds Transfers

Part 1.	Subject Matter and Definitions.....	75-4A-101
Part 2.	Issue and Acceptance of Payment Order.....	75-4A-201
Part 3.	Execution of Sender’s Payment Order by Receiving Bank....	75-4A-301
Part 4.	Payment.....	75-4A-401
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PART 1.

SUBJECT MATTER AND DEFINITIONS.

SEC.	
75-4A-101.	Short title.
75-4A-102.	Subject matter.
75-4A-103.	Payment order—Definitions.
75-4A-104.	Funds transfer—Definitions.
75-4A-105.	Other definitions.
75-4A-106.	Time payment order is received.
75-4A-107.	Federal reserve regulations and operating circulars.
75-4A-108.	Exclusion of consumer transactions governed by federal law.

§ 75-4A-101. Short title.

This chapter may be cited as Uniform Commercial Code — Funds Transfers.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-102. Subject matter.

Except as otherwise provided in Section 75-4A-108, this chapter applies to funds transfers defined in Section 75-4A-104.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-103. Payment order—Definitions.

(a) In this chapter:

- (1) “Payment order” means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:
 - (i) The instruction does not state a condition to payment to the beneficiary other than time of payment;
 - (ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender; and
 - (iii) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) “Beneficiary” means the person to be paid by the beneficiary’s bank.

(3) “Beneficiary’s bank” means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) “Receiving bank” means the bank to which the sender’s instruction is addressed.

(5) “Sender” means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definitions of this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-104. Funds transfer—Definitions.

In this chapter:

(a) “Funds transfer” means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order.

(b) “Intermediary bank” means a receiving bank other than the originator’s bank or the beneficiary’s bank.

(c) “Originator” means the sender of the first payment order in a funds transfer.

(d) “Originator’s bank” means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this chapter to funds transfers defined in this section, see § 75-4A-102.

Definitions of this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-105. Other definitions.

(a) In this chapter:

(1) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an

account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this chapter.

(3) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) Funds-transfer business day“ of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) “Funds-transfer system” means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) “Prove” with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(8)).

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Acceptance”	Section 75-4A-209
“Beneficiary”	Section 75-4A-103
“Beneficiary’s bank”	Section 75-4A-103
“Executed”	Section 75-4A-301
“Execution date”	Section 75-4A-301
“Funds transfer”	Section 75-4A-104
“Funds-transfer system rule”	Section 75-4A-501
“Intermediary bank”	Section 75-4A-104
“Originator”	Section 75-4A-104
“Originator’s bank”	Section 75-4A-104
“Payment by beneficiary’s bank to beneficiary”	Section 75-4A-405
“Payment by originator to beneficiary”	Section 75-4A-406
“Payment by sender to receiving bank”	Section 75-4A-403
“Payment date”	Section 75-4A-401
“Payment order”	Section 75-4A-103
“Receiving bank”	Section 75-4A-103
“Security procedure”	Section 75-4A-201
“Sender”	Section 75-4A-103

(c) The following definitions in Title 75, Chapter 4, apply to this chapter:

“Clearinghouse”	Section 75-4-104
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“Item” Section 75-4-104

“Suspends payments” Section 75-4-104

(d) In addition Title 75, Chapter 1, contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Section 75-1-201(27). A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this chapter refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this chapter.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-107. Federal reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the federal reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-108. Exclusion of consumer transactions governed by federal law.

This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. 1693 et seq.) as amended from time to time.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this chapter, except as otherwise provided in this section, see § 75-4A-102.

RESEARCH REFERENCES

Am Jur. 17 Am. Jur. 2d, Consumer and Borrower Protection §§ 298-311.

PART 2.

ISSUE AND ACCEPTANCE OF PAYMENT ORDER.

SEC.

- 75-4A-201. Security procedure.
- 75-4A-202. Authorized and verified payment orders.
- 75-4A-203. Unenforceability of certain verified payment orders.
- 75-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.
- 75-4A-205. Erroneous payment orders.
- 75-4A-206. Transmission of payment order through funds-transfer or other communication system.
- 75-4A-207. Misdescription of beneficiary.
- 75-4A-208. Misdescription of intermediary bank or beneficiary's bank.
- 75-4A-209. Acceptance of payment order.
- 75-4A-210. Rejection of payment order.
- 75-4A-211. Cancellation and amendment of payment order.
- 75-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

§ 75-4A-201. Security procedure.

“Security procedure” means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of “Security procedure” defined in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-202. Authorized and verified payment orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the

receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term “sender” in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 75-4A-203(a)(1), rights and obligations arising under this section or Section 75-4A-203 may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Unenforceability of certain verified payment orders, see § 75-4A-203.

Refund of payment, see § 75-4A-204.

§ 75-4A-203. Unenforceability of certain verified payment orders.

(a) If an accepted payment order is not, under Section 75-4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 75-4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Refund of payment, see § 75-4A-204.

§ 75-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 75-4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 75-4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in Section 75-1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to requirement that receiving bank pay interest on amount refunded when sender pays order it was not obliged to pay, see § 75-4A-402.

§ 75-4A-205. Erroneous payment orders.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously

instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Section 75-4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

JUDICIAL DECISIONS

1. In general.

The "discharge of value" rule of restitution, rather than the common law "mistake of fact" rule, governs an action to

recover funds sent in error by a duplicate wire transfer. *Credit Lyonnais N.Y. Branch v. Koval*, 745 So. 2d 837 (Miss. 1999).

§ 75-4A-206. Transmission of payment order through funds-transfer or other communication system.

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the federal reserve banks.

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Erroneous payment orders, see § 75-4A-205.

§ 75-4A-207. Misdescription of beneficiary.

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the

originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

§ 75-4A-208. Misdescription of intermediary bank or beneficiary's bank.

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Section 75-4A-302(a)(1).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-209. Acceptance of payment order.

(a) Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in Section 75-4A-405(a) or 75-4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to Section 75-4A-403(a)(1) or 75-4A-403(a)(2); or

(3) The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one (1) hour after that time, or (ii) one (1) hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of

the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Section 75-4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "Acceptance" in this section applicable to this chapter, see § 75-4A-105.

Liability based on acceptance arises only when acceptance occurs as stated in this section, see § 75-4A-212.

Obligations of receiving bank when it accepts payment order pursuant to this section, see § 75-4A-302.

§ 75-4A-210. Rejection of payment order.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the

amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 75-4A-211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-211. Cancellation and amendment of payment order.

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a), a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Right of bank to recover payment where originator's bank executes originator's payment order before execution date or pays beneficiary of originator's payment order before payment date and payment order is canceled pursuant to this section, see § 75-4A-209.

Obligation of bank to pay interest to sender from execution date to date order is canceled pursuant to this section when bank fails to execute payment order despite existence of sufficient funds, see § 75-4A-210.

Application of this section to obligation of beneficiary's bank to pay and give notice to beneficiary, see § 75-4A-404.

Application of this section to time and amount of payment by originator to beneficiary, see § 75-4A-406.

§ 75-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Section 75-4A-209, and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

PART 3.

EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK.

SEC.

- 75-4A-301. Execution and execution date.
- 75-4A-302. Obligations of receiving bank in execution of payment order.
- 75-4A-303. Erroneous execution of payment order.
- 75-4A-304. Duty of sender to report erroneously executed payment order.
- 75-4A-305. Liability for late or improper execution or failure to execute payment order.

§ 75-4A-301. Execution and execution date.

(a) A payment order is “executed” by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary’s bank can be accepted but cannot be executed.

(b) “Execution date” of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender’s order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender’s instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definitions of “Executed” and “Execution date” in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-302. Obligations of receiving bank in execution of payment order.

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to Section 75-4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender’s order and to follow the sender’s instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator’s bank issues a payment order to an intermediary bank, the originator’s bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender’s instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the

funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Reliance on either name or number identifying different persons by receiving bank in executing sender's payment order as breach of obligation stated in this section, see § 75-4A-208.

Liability of receiving bank for late or improper execution or failure to execute payment order in breach of this section, see § 75-4A-305.

Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

§ 75-4A-303. Erroneous execution of payment order.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's

order under Section 75-4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under Section 75-4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Duty of sender to report erroneously executed payment orders, see § 75-4A-304.

Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

§ 75-4A-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in Section 75-4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Section 75-4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to requirement that receiving bank pay interest on amount refunded when sender pays order it was not obliged to pay, see § 75-4A-402.

§ 75-4A-305. Liability for late or improper execution or failure to execute payment order.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Section 75-4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of Section 75-4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

PART 4.

PAYMENT.

SEC.

75-4A-401. Payment date.

- 75-4A-402. Obligation of sender to pay receiving bank.
- 75-4A-403. Payment by sender to receiving bank.
- 75-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.
- 75-4A-405. Payment by beneficiary's bank to beneficiary.
- 75-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

§ 75-4A-401. Payment date.

“Payment date” of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of “Payment date” in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-402. Obligation of sender to pay receiving bank.

(a) This section is subject to Sections 75-4A-205 and 75-4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to Section 75-4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 75-4A-204 and 75-4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Section 75-4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction

requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Right of receiving bank to payment under this section when there is erroneous execution of payment order, see § 75-4A-303.

Bank not obligated to pay interest to sender under this section where sender fails to report erroneously executed payment order, see § 75-4A-304.

Payment of sender's obligation under this section to pay receiving bank, see § 75-4A-403.

Conditions under which obligation of sender to pay its payment order under this section excused, see § 75-4A-405.

§ 75-4A-403. Payment by sender to receiving bank.

(a) Payment of the sender's obligation under Section 75-4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a federal reserve bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Section

75-4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one (1) bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under Section 75-4A-402(b) or 75-4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "Payment by sender to receiving bank" in this section applicable to this chapter, see § 75-4A-105.

Time at which beneficiary's bank accepts payment order, see § 75-4A-209.

§ 75-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(a) Subject to Sections 75-4A-211(e), 75-4A-405(d), and 75-4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Payment by beneficiary's bank to beneficiary, see § 75-4A-405.

Originator subrogated to rights of beneficiary to receive payment from beneficiary's bank under this section if payment by originator does not result in discharge, see § 75-4A-406.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

§ 75-4A-405. Payment by beneficiary's bank to beneficiary.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Section 75-4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Section 75-4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Section 75-4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer,

(i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under Section 75-4A-406, and (iv) subject to Section 75-4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under Section 75-4A-402(c) because the funds transfer has not been completed.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "Payment by beneficiary's bank to beneficiary" in this section applicable to this chapter, see § 75-4A-105.

Time at which beneficiary's bank accepts payment order, see § 75-4A-209.

Application of this section to obligation of beneficiary's bank to pay and give notice to beneficiary, see § 75-4A-404.

Application of this section to time and amount of payment by originator to beneficiary, see § 75-4A-406.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

§ 75-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

(a) Subject to Sections 75-4A-211(e), 75-4A-405(d), and 75-4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Section 75-4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon

demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of “Payment by originator to beneficiary” in this section applicable to this chapter, see § 75-4A-105.

Conditions under which no payment by originator of funds transfer to beneficiary occurs under this section, see § 75-4A-405.

PART 5.

MISCELLANEOUS PROVISIONS.

SEC.

- 75-4A-501. Variation by agreement and effect of funds-transfer system rule.
- 75-4A-502. Creditor process served on receiving bank; setoff by beneficiary's bank.
- 75-4A-503. Injunction or restraining order with respect to funds transfer.
- 75-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.
- 75-4A-505. Preclusion of objection to debit of customer's account.
- 75-4A-506. Rate of Interest.
- 75-4A-507. Choice of law.

§ 75-4A-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) “Funds-transfer system rule” means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this chapter, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Sections 75-4A-404(c), 75-4A-405(d), and 75-4A-507(c).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of “Funds-transfer system rule” in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-502. Creditor process served on receiving bank; set-off by beneficiary's bank.

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-503. Injunction or restraining order with respect to funds transfer.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.

(a) If a receiving bank has received more than one (1) payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-505. Preclusion of objection to debit of customer's account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one (1) year after the notification was received by the customer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-506. Rate of Interest.

(a) If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), the amount is calculated by multiplying the applicable federal funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable federal funds rate is the average of the federal funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by three hundred sixty (360). The federal funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-507. Choice of law.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) If a funds transfer is made by use of more than one (1) funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of governing law on funds transfers specified in this section over contrary agreement, see § 75-1-105.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

CHAPTER 5

Uniform Commercial Code—Revised Article 5. Letters of Credit

SEC.	
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75-5-102.	Definitions.
75-5-103.	Scope.
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§ 75-5-101. Short title.

This chapter may be cited as Uniform Commercial Code—Revised Article 5. Letters of Credit.

SOURCES: Laws, 1996, ch. 460, § 2, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-101 [Codes, 1942, § 41A:5-101; Laws, 1966, ch. 316, § 5-101, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Laws, 1996, ch. 460, §§ 1, 28, 29, provide as follows:

“SECTION 1. The purpose of this act is to repeal the chapter of law known as the “Uniform Commercial Code—Letters of Credit” and to recodify replacement versions of that law under the same chapter number in the Mississippi Code of 1972, which provisions are to be known as the “Uniform Commercial Code—Revised Article 5. Letters of Credit.

“SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act [July 1, 1996]. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act [July 1, 1996].

“SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act [July 1, 1996] and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.”

Cross References — Definition and operation of acceptance, see § 75-3-410.

Definitions, see § 75-5-102.

Scope of division, see § 75-5-103.

JUDICIAL DECISIONS

1. In general.

When a supporting document stating that the goods conform is in harmony with the requirements of the letter of credit, the issuing bank is not required to go behind the supporting document to determine whether it is in fact sufficient. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

The Article on letters of credit is to be liberally interpreted. The requirement of rigid adherence to material matters must strike a balance with the concept of reasonable flexibility as to minor matters in

order to facilitate trade. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

Documents supporting a letter of credit are to be strictly construed because international financing transactions rest upon the accuracy of documents rather than upon the condition of the goods they represent. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 1, 6.

CJS. 10 C.J.S., Bills and Notes §§ 165-169, 174, 202, 204.

Law Reviews. Czarnetzky, Sympo-

sium on the Uniform Commercial Code: Modernizing Commercial Financing Practices: The Revisions to Article 5 of the Mississippi UCC. 66 Miss. L. J. 325, Winter, 1996.

§ 75-5-102. Definitions.

(a) In this chapter:

(1) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed or amended.

(2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a

written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in Section 75-5-108(e), and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) “Good faith” means honesty in fact in the conduct or transaction concerned.

(8) “Honor” of a letter of credit means performance of the issuer’s undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, “honor” occurs:

(i) Upon payment;

(ii) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(iii) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) “Issuer” means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family or household purposes.

(10) “Letter of credit” means a definite undertaking that satisfies the requirements of Section 75-5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) “Nominated person” means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate or otherwise give value under a letter of credit, and (ii) undertakes by agreement or custom and practice to reimburse.

(12) “Presentation” means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) “Presenter” means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) “Successor of a beneficiary” means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator and receiver.

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Accept” or “Acceptance” Section 3-409 [Section 75-3-409]

“Value” Sections 3-303, 4-211 [Sections 75-3-303, 75-4-211]

(c) Chapter 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1996, ch. 460, § 3, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-102 [Codes, 1942, § 41A:5-102; Laws, 1966, ch. 316, § 5-102, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Supplementary general principles of law applicable, see § 75-1-103.

General definitions and principles of interpretation, see §§ 75-1-201 et seq.

Course of dealing and usage of trade, see § 75-1-205.

"Letter of credit," "banker's credit" and "confirmed credit" with reference to sales of goods, see § 75-2-325.

Scope of division, see § 75-5-103.

Issuance, amendment, cancellation and duration, see § 75-5-106.

Confirmers, nominated persons and advisers, see § 75-5-107.

Issuer's obligations, see § 75-5-108.

Definitions, see § 75-9-102.

JUDICIAL DECISIONS

1. In general.

A letter was not a "letter of credit" where it merely advised the president of a construction company that an association with which the company had entered into a construction agreement had applied to the Farmers Home Administration for a loan, that the application had been approved by the Farmers Home Administration and the lending bank subject to certain conditions, and that the bank had set aside a specified sum to be payable to the construction company and the association on funding of the loan by Farmers Home Administration. *Hendry Constr. Co. v. Bank of Hattiesburg*, 562 So. 2d 100 (Miss. 1990).

Failure of customer to give prior consent, as required by Florida UCC § 5-106, to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. *Lewis State Bank v. Advance Mtg. Corp.*, 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978).

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank, and (2) bank contended that letter was not

letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103, even though it did not expressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any "particular form of phrasing." *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

Letter in which bank issued its "irrevocable and unconditional commitment" to corporation to purchase corporation's promissory note from holder in due course at note's maturity date if such holder gave bank 60 days' written notice of holder's intention to sell note to bank, and in which bank agreed "with the drawers, endorsers, and bona fide holders that this credit will be duly honored on presentation" in amount not to exceed unpaid balance of principal and interest due on presentation, was letter of credit within meaning of UCC § 5-103 because (1) such letter complied with UCC § 5-102 by creating a credit that required "documentary demand for payment," and (2) presentation of note in issue, as required by bank's letter, was "documentary demand for payment" within meaning of UCC § 5-103. *Bank of N.C. v. Rock Island Bank*, 570 F.2d 202 (7th Cir. Ill. 1978), on remand,

471 F. Supp. 1301 (C.D. Ill. 1979), rev'd on other grounds, 630 F.2d 1243 (7th Cir. Ill. 1980).

Where payment under terms of a letter of credit depended on presentation of a "written notice" to the issuer, which notice was to be accompanied "by the original of the letter of credit" at the request of a specified person if required for a specified purpose, and where the requirement of a written notice from the beneficiary lacked any evidentiary purpose or significance and the credit was essentially a "clean" credit, such letter of credit did not require a "documentary draft" or "documentary demand for payment" within meaning of UCC § 5-103, since traditionally a document like that described in UCC § 5-103 consists of a paper that has evidentiary value of some fact. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

The essential characteristic of a letter of credit, which is defined in UCC § 5-103, is that it represents an affirmative undertaking by the bank to honor the beneficiary's draft or demand for payment if it complies with the terms of the credit. The credit is an assurance of payment in the context of a "paper" transaction. The undertaking of the issuing bank, although initiated at the request and for the account of its customer, usually in connection with the customer's contractual relationship with the beneficiary, is an independent primary and direct obligation of the bank to the beneficiary. The issuer's obligation to the beneficiary is completely independent of both the relationship between the issuer and its customer in regard to the letter of credit and the relationship between the customer and the beneficiary on the underlying transaction. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Under UCC § 5-103, a "notice of default" on the underlying obligation must be in writing. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a "standby letter of credit" where it (1) advised plaintiff of commitment by defen-

dant to assume obligation arising from note signed by defendant's customer, and (2) agreed to honor that commitment six months after date of customer's note on notice that loan for which note was given had not been repaid. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank's agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

In action by beneficiary of letter of credit against issuer to recover sum due under letter, where evidence showed that beneficiary, on receipt of certified check for \$40,000 from person procuring letter's issuance, had posted \$40,000 bond to vacate *lis pendens* filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the \$40,000 certified check to procurer of letter; and beneficiary had not made payment on real estate bond, since under UCC § 5-103, issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrence of liability under such bond; and (3) issuer's claim that beneficiary's release of collateral (the \$40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. *Travelers Indem. Co. v. Flushing Nat'l Bank*, 90 Misc. 2d 964 (1977).

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer's claim that letter of credit was "standby" letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. *Brummer v. Bankers Trust*, 268 S.C. 21, 231 S.E.2d 298 (1977).

Bill of sale draft which was given in payment for cattle and which specifically

provided that drawee-bank, at its option, could refuse to honor it unless bill of sale was properly filled out, was a "documentary draft" under UCC § 5-103, since instrument on its face specifically provided that condition of honor was bill of sale attached to draft as document of title to describe cattle; therefore, drawee-bank was not liable for failure to pay or return item or send notice of dishonor prior to its midnight deadline since under UCC § 5-112 it could defer honor until close of third banking day following receipt of document at which time presenter of draft consented to bank holding draft for future payment. *Marfa Nat'l Bank v. Powell*, 512 S.W.2d 356 (Tex. Civ. App. 1974), *ref. n.r.e* (Dec. 4, 1974).

With regard to letter of credit issued by bank, existence of bank confirmation of non-bank credit is not precluded, and "confirming" bank is liable for credit extended in reliance on its letter, which credit customer was unable to satisfy because of insufficient funds. *Barclays Bank*

D.C.O. v. Mercantile Nat'l Bank, 339 F. Supp. 457 (N.D. Ga. 1972), *aff'd*, 481 F.2d 1224 (5th Cir. Ga. 1973), *reh'g denied*, 481 F.2d 1403 (5th Cir. Ga. 1973), *cert. dismissed*, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

The same general principles which apply to other contracts in writing govern letters of credit, and as between the beneficiary and the issuer of the letter of credit, if ambiguity exists, then in construing such letter it is necessary to take the words as strongly against the issuer as a reasonable reading will justify, and generally courts are to avoid a construction of a letter of credit which would place a serious restriction upon ordinary business methods. *Fair Pavilions, Inc. v. First Nat'l City Bank*, 24 A.D.2d 109 (1st Dep't 1965), *motion withdrawn*, 18 N.Y.2d 709, 274 N.Y.S.2d 146, 220 N.E.2d 794 (1966), *rev'd on other grounds*, 19 N.Y.2d 512, 281 N.Y.S.2d 23, 227 N.E.2d 839 (1967), *motion denied*, 19 N.Y.2d 898, 281 N.Y.S.2d 90, 227 N.E.2d 887 (1967).

RESEARCH REFERENCES

ALR. What is a letter of credit under UCC §§ 5-102, 5-103. 44 A.L.R.4th 172.

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 1-3, 5, 6, 10, 19, 23, 32.

Instructions to jury; "notation credit"

defined; obligations of purchaser or payor under notation credit, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Form 5:26.

CJS. 10 C.J.S., Bills and Notes §§ 165-169, 202, 204.

§ 75-5-103. Scope.

(a) This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this chapter.

(c) With the exception of this subsection, subsections (a) and (d), Sections 75-5-102(a)(9) and (10), 75-5-106(d), and 75-5-114(d), and except to the extent prohibited in Sections 75-1-102(3) and 75-5-117(d), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements

between the issuer and the applicant and between the applicant and the beneficiary.

SOURCES: Laws, 1996, ch. 460, § 4, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-103 [Codes, 1942, § 41A:5-103; Laws, 1966, ch. 316, § 5-103, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Purposes and rules of construction, see § 75-1-102.
Choice of law and forum, see § 75-5-116.

JUDICIAL DECISIONS

1. In general; applicability.
2. Construing letter of credit.
3. Definitions.
4. Duty of issuer.
5. Termination.
6. Miscellaneous.

1. In general; applicability.

In the traditional letter-of-credit situation wherein a credit is used to assure payment to the seller in a sale-of-goods transaction, the terms of the credit expressly require the seller-beneficiary to present documents, such as documents of title, as part of the seller-beneficiary's demand for payment. The presentation of such documents not only provides something of value to the bank, but also serves to facilitate the sale transaction by providing some evidence that the seller is performing its obligations on the underlying transaction. However, a letter of credit need not require a documentary draft or a documentary demand for payment. A bank, instead, may issue "clean" letters of credit and such letters, under UCC § 5-102, are within the coverage of UCC Article 5. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Short letter issued by bank, which was so written that a reasonable person against whom it was to operate should have noticed from its express language that it indisputably purported to be an irrevocable letter of credit, stated "conspicuously" within meaning of UCC § 5-102 that it was a letter of credit and thus subject to provisions of UCC Article 5. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Historically, the letter of credit was developed to facilitate the sale of goods be-

tween distant and unfamiliar buyers and sellers. It was an arrangement under which a bank, whose credit was acceptable to a seller, would at the instance of the buyer agree to pay drafts drawn on it by the seller, provided that certain documents, such as a bill of lading, accompanied the drafts. However, expansion in the use of the letter of credit was a natural development in commercial banking, and elasticity in its use was made possible by the broad concept expressed in UCC Article 5. As a result, the letter was readily adaptable to a new commercial banking practice that utilizes what is known as a "standby letter of credit." This usage of a letter of credit is akin to a guaranty, for the bank's sole function is to act as surety for its customer's failure to pay. The standby letter of credit remains a primary obligation that is triggered by the presentation of documentation as a precondition to payment. The bank which has issued the letter needs only to determine whether the document presented appears, on its face, to be in accordance with the terms and conditions of the credit. The bank's responsibility to honor the credit exists independently of the underlying obligation, even though such responsibility may be conditioned on notice of a breach of the underlying obligation. It is now well established that the issuance of a "standby letter of credit" is a legitimate use by a bank of its credit and not an unauthorized excursion into the business of suretyship. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a "standby letter of credit" where it (1) ad-

vised plaintiff of commitment by defendant to assume obligation arising from note signed by defendant's customer, and (2) agreed to honor that commitment six months after date of customer's note on notice that loan for which note was given had not been repaid. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank's agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102, UCC Article 5 applied to "clean" letter of credit (letter requiring beneficiary to present draft and no other documents) where letter conspicuously stated that it was letter of credit. *Baker v. National Blvd. Bank*, 399 F. Supp. 1021 (N.D. Ill. 1975).

2. Construing letter of credit.

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank, and (2) bank contended that letter was not letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103, even though it did not expressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any "particular form of phrasing." *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

Short letter issued by bank, which was so written that a reasonable person against whom it was to operate should have noticed from its express language that it indisputably purported to be an irrevocable letter of credit, stated "conspicuously" within meaning of UCC § 5-102 that it was a letter of credit and thus

subject to provisions of UCC Article 5. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Where letter of credit issued by bank provided that all funds under the credit were available to the beneficiary on presentation to the issuer of "written notice" and "the original letter of credit," and where such letter of credit in no way indicated that any documentation in addition to the "written notice" was required to establish that the funds available under the credit were being requested by the beneficiary for the purpose specified, such letter operated as an assurance that the beneficiary would receive payment on a money obligation already owed to it. Accordingly, since the credit was not conditioned on the presentation of any "documents," the issuer's dishonor of the beneficiary's demand for payment, which complied with the terms of the credit, was wrongful. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

The same general principles which apply to other contracts in writing govern letters of credit, and as between the beneficiary and the issuer of the letter of credit, if ambiguity exists, then in construing such a letter it is necessary to take the words as strongly against the issuer as a reasonable reading will justify. *Fair Pavilions, Inc. v. First Nat'l City Bank*, 24 A.D.2d 109 (1st Dep't 1965), motion withdrawn, 18 N.Y.2d 709, 274 N.Y.S.2d 146, 220 N.E.2d 794 (1966), rev'd on other grounds, 19 N.Y.2d 512, 281 N.Y.S.2d 23, 227 N.E.2d 839 (1967), motion denied, 19 N.Y.2d 898, 281 N.Y.S.2d 90, 227 N.E.2d 887 (1967).

3. Definitions.

A letter was not a "letter of credit" where it merely advised the president of a construction company that an association with which the company had entered into a construction agreement had applied to the Farmers Home Administration for a loan, that the application had been approved by the Farmers Home Administration and the lending bank subject to certain conditions, and that the bank had set aside a specified sum to be payable to the construction company and the association on funding of the loan by Farmers Home

Administration. *Hendry Constr. Co. v. Bank of Hattiesburg*, 562 So. 2d 100 (Miss. 1990).

Letter in which bank issued its “irrevocable and unconditional commitment” to corporation to purchase corporation’s promissory note from holder in due course at note’s maturity date if such holder gave bank 60 days’ written notice of holder’s intention to sell note to bank, and in which bank agreed “with the drawers, endorsers, and bona fide holders that this credit will be duly honored on presentation” in amount not to exceed unpaid balance of principal and interest due on presentation, was letter of credit within meaning of UCC § 5-103 because (1) such letter complied with UCC § 5-102 by creating a credit that required “documentary demand for payment,” and (2) presentation of note in issue, as required by bank’s letter, was “documentary demand for payment” within meaning of UCC § 5-103. *Bank of N.C. v. Rock Island Bank*, 570 F.2d 202 (7th Cir. Ill. 1978), on remand, 471 F. Supp. 1301 (C.D. Ill. 1979), rev’d on other grounds, 630 F.2d 1243 (7th Cir. Ill. 1980).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank’s agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer’s claim that letter of credit was “standby” letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. *Brummer v. Bankers Trust*, 268 S.C. 21, 231 S.E.2d 298 (1977).

The fact that the UCC provides a definition for a confirming bank with regard to a letter of credit issued by a bank does not preclude the existence of a bank confirmation of a non-bank credit. *Barclays Bank D.C.O. v. Mercantile Nat’l Bank*,

339 F. Supp. 457 (N.D. Ga. 1972), aff’d, 481 F.2d 1224 (5th Cir. Ga. 1973), reh’g denied, 481 F.2d 1403 (5th Cir. Ga. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

4. Duty of issuer.

Where letter of credit issued by bank provided that all funds under the credit were available to the beneficiary on presentation to the issuer of “written notice” and “the original letter of credit,” and where such letter of credit in no way indicated that any documentation in addition to the “written notice” was required to establish that the funds available under the credit were being requested by the beneficiary for the purpose specified, such letter operated as an assurance that the beneficiary would receive payment on a money obligation already owed to it. Accordingly, since the credit was not conditioned on the presentation of any “documents,” the issuer’s dishonor of the beneficiary’s demand for payment, which complied with the terms of the credit, was wrongful. *Housing Sec., Inc. v. Maine Nat’l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a “standby letter of credit” where it (1) advised plaintiff of commitment by defendant to assume obligation arising from note signed by defendant’s customer, and (2) agreed to honor that commitment six months after date of customer’s note on notice that loan for which note was given had not been repaid. *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978).

The duty of an issuer goes no further than to verify that required documents conform to the letter of credit. *Fair Pavilions, Inc. v. First Nat’l City Bank*, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

5. Termination.

When a letter of credit is to terminate upon the submission to the issuer of an affidavit stating the occurrence of any one of certain specified events the letter is terminated and the issuer does not have the burden of determining whether the affidavit is correct. *Fair Pavilions, Inc. v.*

First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

When a letter of credit is to terminate upon the submission of an affidavit that one or more specified events have occurred the affidavit must specify what event has occurred and it is insufficient that the affidavit state "one or more of the events described...have occurred." *Fair Pavilions, Inc. v. First Nat'l City Bank*, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

6. Miscellaneous.

President of corporation opening line of credit with bank waived receipt of documents required by terms of line of credit when he agreed to pay on note without receiving document and failed to demand documents in writing after receiving telex informing him of third party's default. *International Leather Distribs., Inc. v. Chase Manhattan Bank*, 464 F. Supp. 1197 (S.D.N.Y. 1979), *aff'd*, 607 F.2d 996 (2d Cir. N.Y. 1979).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 5, dealing with letters of credit. 35 A.L.R.3d 1404.

What is a letter of credit under UCC §§ 5-102, 5-103. 44 A.L.R.4th 172.

Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 38 Am. Jur. 2d, Guaranty § 1 et seq.

50 Am. Jur. 2d, Letters of Credit §§ 1, 3, 5, 6, 10, 19.

CJS. 10 C.J.S., Bills and Notes § 174.

38A C.J.S., Guaranty §§ 8, 9.

§ 75-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment or cancellation may be issued in any form that is a record and is authenticated (i) by a signature, or (ii) in accordance with the agreement of the parties or the standard practice referred to in Section 75-5-108(e).

SOURCES: Laws, 1996, ch. 460, § 5, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-104 [Codes, 1942, § 41A:5-104; Laws, 1966, ch. 316, § 5-104, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Contracts that must be in writing, see § 15-3-1.

Supplementary general principles of law applicable, see § 75-1-103.

Modification, rescission, and waiver, see § 75-2-209.

Definition of "letter of credit," see § 75-5-102(a)(10).

Consideration, see § 75-5-105.

Choice of law and forum, see § 75-5-116.

JUDICIAL DECISIONS

1. In general.

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank,

and (2) bank contended that letter was not letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103(1)(a), even though it did not ex-

pressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any “particular form of phrasing.” *First Am. Nat’l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

Where, under New York UCC § 5-102,

New York UCC Article 5 did not apply to letter of credit that was subject to Uniform Customs and Practice for Commercial Documentary Credits (UCP), silence of UCP on question of oral modification of irrevocable letter of credit required such modification to be governed by pre-UCC case law. *W. Pat Crow Forgings, Inc. v. Moorings Aero Indus., Inc.*, 93 Misc. 2d 65 (1978).

RESEARCH REFERENCES

ALR. Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 8, 14.

72 Am. Jur. 2d, Statute of Frauds § 154.

Formal requirements, 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 5 — Letters of Credit, §§ 253:2401 et seq.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204.

§ 75-5-105. Consideration.

Consideration is not required to issue, amend, transfer or cancel a letter of credit, advice or confirmation.

SOURCES: Laws, 1996, ch. 460, § 6, eff from and after July 1, 1996.

Editor’s Note — Former § 75-5-105 [Codes, 1942, § 41A:5-105; Laws, 1966, ch. 316, § 5-105, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Waiver or renunciation of claim or right after breach, without consideration, see § 75-1-107.

Letter of credit in contract for sale of goods, see § 75-2-325(3).

JUDICIAL DECISIONS

1. In general.

It is not to be expected that a financial institution will engage its credit without some form of anticipated remuneration. It is also not to be expected that the beneficiary will know what the issuer’s remuneration was, or whether in fact there was any identifiable remuneration in a given case. And since it would be extraordinarily difficult for the beneficiary to prove the issuer’s remuneration, UCC § 5-105 (providing that no consideration is necessary to establish a credit) dispenses with such proof. *First Am. Nat’l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

In action by beneficiary of letter of credit against issuer to recover sum due

under letter, where evidence showed that beneficiary, on receipt of certified check for \$40,000 from person procuring letter’s issuance, had posted \$40,000 bond to vacate *lis pendens* filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the \$40,000 certified check to procurer of letter; and that under letter’s terms, beneficiary by sight draft could draw full amount of credit specified in letter by certifying that beneficiary had incurred liability in connection with bond posted in the real estate action, (1) issuer of letter could not claim that there was no consideration for its issuance, since UCC § 5-105 provides that consideration is not necessary; (2)

issuer also could not defend liability on ground that beneficiary had not made payment on real estate bond, since under UCC § 5-103, issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrence of liability under such bond; and (3) issuer's claim that beneficia-

ry's release of collateral (the \$40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. *Travelers Indem. Co. v. Flushing Nat'l Bank*, 90 Misc. 2d 964 (1977).

RESEARCH REFERENCES

Am Jur. 50 *Am. Jur. 2d*, Letters of Credit § 16.

CJS. 10 *C.J.S.*, Bills and Notes §§ 202, 204.

§ 75-5-106. Issuance, amendment, cancellation and duration.

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one (1) year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five (5) years after its stated date of issuance, or if none is stated, after the date on which it is issued.

SOURCES: Laws, 1996, ch. 460, § 7, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-106 [Codes, 1942, § 41A:5-106; Laws, 1966, ch. 316, § 5-106, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Letter of credit in contract for sale of goods, see § 75-2-325(3). Scope of chapter, see § 75-5-103.

Absence of necessity for consideration in modifying terms of credit, see § 75-5-105.

Obligation of adviser, nominating person, and confirmer, see § 75-5-107.

Right of issuer to reimbursement for payment made under credit, see § 75-5-108.

JUDICIAL DECISIONS

1. In general.

Where (1) bank issued letter of credit to provide equipment lessor with security for lease of equipment to bank's customer, (2) bank, before issuing such letter, required that it be guaranteed by defendant and

one other guarantor, (3) after issuance of letter of credit, defendant guarantor claimed that he, by a personal letter to bank, had expressly modified his unconditional guaranty of the letter of credit, and (4) bank refused to honor draft against

letter of credit because of guarantors' failure to reimburse bank for full amount of draft, court held (1) that under UCC § 5-106, dealing with effect of establishment of an irrevocable credit, bank became liable on letter of credit when it issued it to bank's customer, (2) that after letter had left bank's control and was established with regard to customer, bank was powerless to modify or revoke it without customer's consent, (3) that bank's inability to modify or revoke the letter without its customer's consent was detriment that constituted sufficient consideration to support defendant's guaranty contract, and (4) that jury did not commit error in determining that defendant guarantor's personal letter to bank did not modify his guaranty of letter of credit. *Goodwin Bros. Leasing v. Citizens Bank*, 587 F.2d 730 (5th Cir. Ga. 1979).

Failure of customer to give prior consent, as required by Florida UCC § 5-106, to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. *Lewis State Bank v. Advance Mtg. Corp.*, 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978).

A release agreement between the beneficiary and the customer as to the underlying transaction does not affect the issuer's obligation on a letter of credit, unless the release agreement explicitly states that the beneficiary has consented to revocation of the credit. The issuing bank may assert the beneficiary's release of the customer as a defense only if the bank is in the position of a surety. The issuing bank, however, is not a surety or guarantor with regard to the customer's obligation. The bank engages its own credit in the first instance by guaranteeing payment when it issues a credit, and its obligation to the beneficiary is completely independent of the underlying transaction between the customer and the beneficiary. Since the issuer's obligation to the beneficiary is a primary and independent obligation, a release or cancellation of the underlying debt, by itself, will not affect the bank's obligation. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 26 U.C.C. Rep. Serv. 750, 2 A.L.R.4th 650 (Me. 1978) (applying UCC § 5-106 and holding, where release agreement between beneficiary and customer made no reference to any consent by beneficiary to revocation of letter of credit, that issuing bank was liable for wrongful dishonor of such credit and that beneficiary, under UCC § 5-115, could recover face value thereof from issuer as damages).

RESEARCH REFERENCES

ALR. Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 17, 23, 32, 74, 80, 81.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204, 206, 208.

§ 75-5-107. Confirmer, nominated person and adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser who is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment or advice has the rights and obligations of an adviser under subsection (c). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment or advice received by the person who so notifies.

SOURCES: Laws, 1996, ch. 460, § 8, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-107 [Codes, 1942, § 41A:5-107; Laws, 1966, ch. 316, § 5-107, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Issuer's obligation, see § 75-5-108.

Limitation on acceptances by banks, see § 81-5-89.

JUDICIAL DECISIONS

1. In general.

Where letter of credit issued by a bank in connection with apartment construction project provided, as two of its three conditions, (1) that another letter of credit issued by a second bank should be "exhausted" before first bank's letter could be drawn on, and (2) that any drafts drawn on first bank's letter must be indorsed "hereon," it was error for district court to conclude that exhaustion requirement meant that funds from second bank's letter of credit must have been fully expended in construction of apartments, rather than simply fully "withdrawn" from such letter of credit, since such conclusion, in violation of UCC § 5-114(1), depended on underlying contract between beneficiary and first bank's customer. It was also error for district court to conclude that indorsement requirement of first bank's letter of credit required indorsement of draft presented by beneficiary, since plain language of such letter of credit required that drafts drawn under it be indorsed "hereon," or, in the terminology of UCC § 5-108(1), be "noted" on the

letter of credit itself. *Pringle-Associated Mtg. Corp. v. Southern Nat'l Bank*, 571 F.2d 871 (5th Cir. 1978).

Advising bank in letter of credit transaction had no obligation beyond transmitting accurate information to beneficiaries of letter of credit. *National Am. Corp. v. Federal Republic of Nig.*, 425 F. Supp. 1365 (S.D.N.Y. 1977).

Bank's letter to lender was confirmation of non-bank's letter of credit under rule that bank may confirm credit issued by non-bank, thus becoming primarily liable on credit. *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. Ga. 1973), reh'g denied, 481 F.2d 1403 (5th Cir. Ga. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

Bank was directly obligated as though it were issuer of letter of credit to extent of its confirmation thereof, where bank confirmed letter of credit in favor of vessel owner agent upon request of correspondent foreign bank; held, confirming bank had added its liability to that of issuing bank and had undertaken to honor under-

lying drafts. *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. N.Y. 1970).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 4, 17, 74, 80, 81.

Rights and obligations of parties; advice of credit; confirmation; risks of transmission and translation or interpretation of message, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:1-5:5.

Advice and confirmation of credit; liability for error in statement of terms, 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 5 — Letters of Credit, §§ 253:2461 et seq.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204, 206, 208.

§ 75-5-108. Issuer's rights and obligations.

(a) Except as otherwise provided in Section 75-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 75-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) To honor;

(2) If the letter of credit provides for honor to be completed more than seven (7) business days after presentation, to accept a draft or incur a deferred obligation; or

(3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) or to mention fraud, forgery or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Section 75-5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) The performance or nonperformance of the underlying contract, arrangement or transaction;

(2) An act or omission of others; or

(3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).

(g) If an undertaking constituting a letter of credit under Section 75-5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) Takes the documents free of claims of the beneficiary or presenter;

(3) Is precluded from asserting a right of recourse on a draft under Sections 75-3-414 and 75-3-415;

(4) Except as otherwise provided in Sections 75-5-110 and 75-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

SOURCES: Laws, 1996, ch. 460, § 9, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-108 [Codes, 1942, § 41A:5-108; Laws, 1966, ch. 316, § 5-108, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Varying provisions of this code by agreement, see § 75-1-102(3).

Obligation of good faith, see § 75-1-203.

Usage of trade, see § 75-1-205.

Formal requirements of letter of credit, see § 75-5-104.

Warranties on transfer and presentment of documentary draft or demand, see § 75-5-111.

Transfers of letters of credit, generally, see § 75-5-112.

Transfers of letters of credit by operation of law, see § 75-5-113.

Warranties on negotiation or transfer of document of title, see § 75-7-507.

JUDICIAL DECISIONS

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|---|------------------------------------|
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| 7. —Revocability. | 17. Other particular applications. |
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| 9. Refusal to honor. | |
| 10. Fraud. | |

1. In general.

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender

complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer's claim that letter of credit was "standby" letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. *Brummer v. Bankers Trust*, 268 S.C. 21, 231 S.E.2d 298 (1977).

2. Duty and authority of issuer.

In suit by American company to enjoin American bank from making payments on two letters of credit to Iranian bank, American bank must honor foreign bank's demand for payment pursuant to UCC § 5-114 since letters of credit, as written, make bank's obligation to honor timely demand for payment unqualified even in view of international political development which hinder economic performance. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

Bank's refusal to honor letters of credit was justified where letters, by their express terms (see UCC § 5-114), had expired prior to presentation of the required documents. *W. Pat Crow Forgings, Inc. v. Moorings Aero Indus., Inc.*, 93 Misc. 2d 65 (1978).

Under UCC § 5-114, bank issuing letter of credit deals in documents, not goods, and is not responsible for any breach of warranty or nonconformity of goods that is involved in the underlying sales contract. Thus, where draft or demand for payment against letter of credit is in good form, it must be honored by bank that issued such letter. *Foreign Venture Ltd. Partnership v. Chemical Bank*, 59 A.D.2d 352, 22 U.C.C. Rep. Serv. 1208 (1st Dep't 1977) (holding that partnership which procured bank's issuance of irrevocable letter of credit, but was not party to such letter, could not enjoin payment of draft presented against letter).

Under UCC § 5-114, issuing bank did not have authority to refuse to pay beneficiary of letter of credit on grounds that it feared that it would be unable to collect from its customer. *Baker v. National Blvd. Bank*, 399 F. Supp. 1021 (N.D. Ill. 1975).

Mutual release between seller and buyer of sugar did not affect bank's obli-

gation on letter of credit in absence of seller's consent to revocation of letter; held, bank's compliance with judgment on letter of credit would not amount to double payment to seller even though seller had settled with buyer. *Asociacion de Azucareros de Guatemala v. United States Nat'l Bank*, 423 F.2d 638 (9th Cir. Or. 1970).

3. —As to conformity of presenting documents.

Terms and conditions of letter of credit must be strictly adhered to; terms constitute agreement between purchaser and bank, and bank has no discretion to waive requirements. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

That bank's action in dishonoring draft for nonconforming documentation is or may have been motivated by desire to protect against its own imprudence in failing to obtain adequate security from customer does not bar bank from insisting on conforming documents; when documentation presented is inadequate, question of security is irrelevant. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Under UCC § 5-114, if demand for payment by beneficiary of letter of credit conforms to terms of such letter, bank issuing letter is obligated to pay, irrespective of any nonconformity in goods shipped and irrespective of most defenses that bank's customer could separately raise against beneficiary. But since Uniform Commercial Code does not specify whether beneficiary should strictly comply with terms of letter of credit or whether substantial performance would suffice, district court would conclude, in action by foreign beneficiary against issuing bank for dishonor of draft presented by beneficiary for payment, that Ohio court would adopt New York rule requiring strict compliance by beneficiary. Thus, since plaintiff foreign beneficiary (seller of goods) did not strictly comply with requirement in letter of credit that original purchase order must be signed by President of domestic corporation (buyer) which procured issuance of such letter of

credit in favor of plaintiff, defendant issuing bank was not required to honor plaintiff's draft when it was presented for payment. *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193 (S.D. Ohio 1977).

Issuing bank was not liable to its customer on ground that it made payment against letter of credit without obtaining proper export license as required by credit agreement, where documents produced with draft drawn on credit appeared on their face to comply with terms of letter of credit. *Philip A. Feinberg, Inc. v. Varig, S.A.*, 80 Misc. 2d 305 (1974), *aff'd*, 47 A.D.2d 1005, 370 N.Y.S.2d 499 (1st Dep't 1975).

Issuing bank properly honored irrevocable letter of credit, thereby complying with terms of UCC § 5-114, despite fact that its customer was engaged in dispute with payee-beneficiary of letter over underlying contract of sale, and bank had knowledge of his dispute, where conditions of letter of credit had been fulfilled and where no injunction existed to restrain bank from releasing funds. *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271 (W.D. Okla. 1974).

Where the inspection certificate with respect to goods purchased in and intended to be imported from a foreign country conformed in all significant respects to the requirements of the letters of credit, the issuing bank could not, under the provisions of this section, refuse to accept and pay drafts drawn on it against the letters. (It should be noted, however, that under the facts stated by the court, the importing company which purchased the letters of credit had issued a series of conflicting and ambiguous instructions to the agent designated to inspect the merchandise prior to the time the certificate of inspection was issued.). *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), *cert. denied*, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

An issuing bank is required to pay or is exonerated from payment on a letter of credit according to whether the documents presented to it conform to what is required by the letter. *Fair Pavilions, Inc. v. First Nat'l City Bank*, 19 N.Y.2d 512,

227 N.E.2d 839 (1967), *reargument denied*, 20 N.Y.2d 758 (1967).

4. —Consulting principal upon non-conformity.

Where bank was justified in rejecting draft on basis of documents presented alone, because it was not clear that purported agent's authority to acknowledge principal's default as required by letter of credit was still in effect, bank did not violate its responsibilities under Uniform Customs and Practices for Documentary Credits, Article 8, by contacting principal to inquire about purported agent's authority. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 266 F. Supp. 106 (D. Mass. 1967), *rev'd on other grounds*, 385 F.2d 230 (1st Cir. Mass. 1967), *cert. denied*, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

5. —Invoices.

Documents tendered by beneficiary of letter of credit to issuer were not in conformity with terms of letter of credit where letter of credit dictated that each invoice express on its face that it covered 100 per cent acrylic yarn but where invoices described shipment as "Imported Acrylic Yarn"; fact that packing lists attached to invoices disclosed on their faces that packages contained "cartons marked:-100 per cent acrylic" did not cure defect in invoices. *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802 (4th Cir. N.C. 1975).

Obvious fact that notation has been superimposed upon invoice to certify compliance with condition of letter of credit does not prevent invoice from being "regular on its face." *Talbot v. Bank of Hendersonville*, 495 S.W.2d 548 (Tenn. Ct. App. 1972).

6. —Proof of agent's authority.

Authorization letter stating that agent's power permitted him to sign contracts and to represent principal before official and private organizations of Venezuela said nothing from which bank could infer that agent possessed authority to make statement to principal's banker amounting to confession of liability authorizing payment on letter of credit of nearly a million dollars. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where terms of letter of credit forbade bank to pay without statement by purchaser acknowledging purchaser's default on contract for sale of goods, and only such acknowledgment submitted was executed by purported representative of purchaser, absence of documentary demonstration of purported representative's continuing authority permitted bank to conclude that he was not agent of purchaser and that terms of credit had not been satisfied. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

7. —Revocability.

Power neither stated to be irrevocable, nor coupled with interest, is revocable at will, and fact that purported agent had previously held power did not require bank to conclude that power remained in effect, for purposes of bank's obligation to honor letter of credit. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where irrevocable letter of credit provided for its termination or cancellation upon receipt by issuing bank of affidavit that one or more events enumerated in building contract had occurred, bank was not justified in refusing payment upon receipt of an affidavit which did not specify the event or events which had occurred. *Fair Pavilions, Inc. v. First Nat'l City Bank*, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), *reargument denied*, 20 N.Y.2d 758 (1967).

8. —Waiver of defects.

Terms and conditions of letter of credit must be strictly adhered to; terms consti-

tute agreement between purchaser and bank, and bank has no discretion to waive requirements. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 266 F. Supp. 106 (D. Mass. 1967), *rev'd on other grounds*, 385 F.2d 230 (1st Cir. Mass. 1967), *cert. denied*, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

9. Refusal to honor.

President of corporation opening line of credit with bank waived receipt of documents required by terms of line of credit when he agreed to pay on note without receiving document and failed to demand documents in writing after receiving telex informing him of third party's default. *International Leather Distribs., Inc. v. Chase Manhattan Bank*, 464 F. Supp. 1197 (S.D.N.Y. 1979), *aff'd*, 607 F.2d 996 (2d Cir. N.Y. 1979).

Letter of credit arising out of unique contractual relationship whereby bank's customer was to furnish to bank statement amounting to confession of liability for breach of contract and authorization of payment of indemnity, was not conventional commercial instrument of trade and transportation; accordingly, bank was justified in refusing to honor credit without documentation establishing purported agent's authority to confess liability. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Bank was justified in refusing to honor letter of credit, where documents submitted by seller did not demonstrate on their face that they conformed to terms and conditions of credit, in that acknowledgment of buyer's default which had to be submitted by terms of credit was executed by person whose power of attorney was

outdated by several months, and not shown by any document to be still in effect. *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 464 F. Supp. 88 (S.D.N.Y. 1978), *aff'd*, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the inspection certificate with respect to goods purchased in and intended to be imported from a foreign country conformed in all significant respects to the requirements of the letters of credit, the issuing bank could not, under the provisions of this section, refuse to accept and pay drafts drawn on it against the letters. (It should be noted, however, that under the facts stated by the court, the importing company which purchased the letters of credit had issued a series of conflicting and ambiguous instructions to the agent designated to inspect the merchandise prior to the time the certificate of inspection was issued.). *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), *cert. denied*, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

10. Fraud.

UCC § 5-114 authorizes court to enjoin payment on letter of credit if it finds fraud in transaction; court interprets "fraud" narrowly, and as general rule letters of credit are independent of underlying contract; call by Iranian bank for payment on letter of credit is fraudulent where underlying contract was cancelled on basis of force majeure provisions and where contract specifically provided that upon such cancellation bank guarantees of good performance would be immediately released. *Itek Corp. v. First Nat'l Bank*, 730 F.2d 19 (1st Cir. Mass. 1984).

Where issuer in drafting letter of credit requested that beneficiary produce written statement to effect that beneficiary was entitled to draw on letter of credit and where beneficiary submitted to issuer affidavit explicitly stating its entitlement to draw on letter, beneficiary more than complied with terms of letter, and issuer was required to honor draft drawn on letter, notwithstanding issuer's claim that beneficiary fraudulently "called" letter in that purpose for which beneficiary sought to have it honored was not purpose contemplated by parties to underlying contract.

Bossier Bank & Trust Co. v. Union Planters Nat'l Bank, 550 F.2d 1077 (6th Cir. Tenn. 1977).

Unless there is fraud in the transaction, drawee bank has right to honor draft drawn against letters of credit which are in good form. *Foreign Venture Ltd. Partnership v. Chemical Bank*, 59 A.D.2d 352 (1st Dep't 1977).

Bank which issued letters of credit at request of mortgagor-customer in favor of plaintiff-mortgagee, pursuant to requirement of federal Department of Housing and Urban Development that mortgagor-borrowers must obtain letters of credit to cover final closing costs on completion of housing project, could not successfully claim that there was fraud in the transaction within meaning of UCC § 5-114 that justified bank's dishonoring of plaintiff's sight drafts where (1) letters of credit in suit were absolute on their face, (2) plaintiff's drafts were drawn in accordance with terms of such letters, (3) defendant's allegation of fraud in the transaction was based on claim that failure of mortgagor's housing project had rendered purpose of letters of credit (i.e., covering of final closing costs) impossible, and (4) plaintiff's presentation of drafts to bank was mandated by federal law governing underlying transaction between the parties. *Mid-States Mtg. Corp. v. National Bank*, 77 Mich. App. 651, 259 N.W.2d 175 (1977).

In suit under UCC § 5-114 to enjoin honoring, on ground of fraud not apparent on face of documents in suit, sight draft presented to defendant bank by defendant beneficiary against letter of credit issued by bank at plaintiff's request, test for granting injunctive relief, which was whether plaintiff had shown fraud not apparent on face of documents in suit, was not met where only fraud alleged by plaintiff was so-called "equitable fraud" of beneficiary in seeking payment under letter of credit after effecting, allegedly in bad faith, rejection of bank loan that plaintiff needed for construction venture and thereby causing conditions precedent for payment of draft under letter of credit to come into existence. In such case, to accept plaintiff's definition of "fraud" would make "fraud" synonymous with "breach of contract." *Werner v. A.L. Grootemaat &*

Sons, 80 Wis. 2d 513, 259 N.W.2d 310, 23 U.C.C. Rep. Serv. 136 (1977) (also holding that plaintiff was not entitled to injunctive relief because it had adequate remedy at law for damages for honoring of sight draft in issue).

Correspondent bank which had presented for payment drafts, drawn pursuant to letters of credit issued by defendant, had satisfied burden of proving that correspondent bank had no notice of fraud in basic transaction which subjected order to be “as sample inspected in Spain”; court refused to infer notice of fraud from repetitive cables showing that buyer had not approved sample; held, it was not clearly erroneous for trial court to have found a want of any notice of fraud. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 409 F.2d 711, 35 A.L.R.3d 1397 (1st Cir. Mass. 1969).

11. Holder in due course.

Where, despite cancellation of contract, buyer was informed that documents had been received by New York bank from Pakistani banks purporting to evidence shipment of boxing gloves under terms of cancelled contract, accompanied by drafts drawn against letter of credit, where inspection of shipments upon their arrival revealed that seller had shipped old, unpadded, ripped and mildewed gloves rather than new gloves to be manufactured as agreed upon, and buyer obtained preliminary injunction prohibiting New York bank from paying drafts, and where Pakistani banks brought action to obtain payment of drafts as holders in due course thereof: (1) although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer, constituted “fraud in the transaction” within meaning of UCC § 5-114, Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; (2) even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but “defense” referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114, i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; (3) since defense

of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller’s alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. *United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

12. Injunctions.

In suit by American company to enjoin American bank from making payments on two letters of credit to Iranian bank, American bank must honor foreign bank’s demand for payment pursuant to UCC § 5-114 since letters of credit, as written, make bank’s obligation to honor timely demand for payment unqualified even in view of international political development which hinder economic performance. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

Iranian bank will be enjoined from making payment on two bank guarantees obtained by American company in favor of “Imperial Government of Iran” without first notifying plaintiff company in writing of receipt of demand for payment and giving plaintiff 10 days in which to provide evidence as to lack of authenticity or fraudulent nature of demand since under present circumstances in Iran, there is serious risk that fraudulent or nonauthentic demand could be issued on guaranty since it is clear that Imperial Government has ceased to function and views of current government with respect to contract in question may be completely in conflict with former imperial government. *Stromberg-Carlson Corp. v. Bank Melli Iran*, 467 F. Supp. 530 (S.D.N.Y. 1979).

Under UCC § 5-114, where issuer of letters of credit, because of commencement of lawsuit, received notice of its customers’ allegations of false certification prior to time payment was made on drafts and where party presenting drafts for payment was not holder in due course,

trial court had discretion to grant temporary injunctive relief against honor of drafts and, since customers would be irreparably injured if injunctive relief was not granted, trial court should issue temporary injunction pending trial on merits. *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 250 N.W.2d 172 (1977).

Where, despite cancellation of contract, buyer was informed that documents had been received by New York bank from Pakistani banks purporting to evidence shipment of boxing gloves under terms of cancelled contract, accompanied by drafts drawn against letter of credit, where inspection of shipments upon their arrival revealed that seller had shipped old, unpadded, ripped and mildewed gloves rather than new gloves to be manufactured as agreed upon, and buyer obtained preliminary injunction prohibiting New York bank from paying drafts, and where Pakistani banks brought action to obtain payment of drafts as holders in due course thereof: (1) although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer, constituted "fraud in the transaction" within meaning of UCC § 5-114, Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; (2) even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114, i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; (3) since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. *United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

In action by lessee of Swiss hotel to enjoin bank from honoring lessor's draft under letter of credit issued pursuant to terms of lease agreement, lessee was not entitled to enjoin honor under UCC § 5-114 on basis that there was "fraud...not apparent on the face of the documents" where lessee failed to establish that lessor had no bona fide claim to payment or that documents presented to bank had absolutely no basis in fact, irrespective of lessor's actual entitlement to payment under lease. *Intraworld Indus., Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A.2d 316 (1975).

Issuing bank properly honored irrevocable letter of credit, thereby complying with terms of UCC § 5-114, despite fact that its customer was engaged in dispute with payee-beneficiary of letter over underlying contract of sale, and bank had knowledge of his dispute, where conditions of letter of credit had been fulfilled and where no injunction existed to restrain bank from releasing funds. *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271 (W.D. Okla. 1974).

13. —For fraud.

Bank issuing letter of credit may be enjoined against making payment upon demand under UCC § 5-114 where there is "fraud in transaction" and party presenting draft is beneficiary or some other party who is not holder in due course under UCC § 3-302. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

In action under UCC § 5-114 by corporation procuring issuance of letter of credit to restrain issuing bank from making payment to letter's beneficiary because of beneficiary's alleged fraud, injunction could not be issued under UCC § 4-303(1)(d) where before temporary restraining order was served on issuing bank, it had determined that beneficiary had complied with terms of letter, had honored letter by mailing check to beneficiary, and had completed process of posting such check to plaintiff's account. *Tranarg, C.A. v. Banca Commerciale Italiana*, 90 Misc. 2d 829 (1977).

Where letters of credit were to be payable to beneficiary upon beneficiary's certification that party procuring letters had

failed to carry out certain of its obligations under their agreement, procuring party would be entitled to permanent injunction restraining bank from honoring letter, if beneficiary's certificate was fraudulent. *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991 (N.D. Ga. 1973).

14. Jurisdiction of courts.

Bankruptcy court did not have summary jurisdiction to enjoin payment of irrevocable letters of credit issued by bank on behalf of bankrupt nearly two years prior to filing of bankruptcy petition where letters were outstanding in hands of third persons and were not secured by property of bankrupt and where trustee had neither actual or constructive possession of money or documents. *Matter of Marine Distributors, Inc.*, C.A.9 (Cal.) 1975, 522 F. 2d 791.

15. Presumptions.

Under UCC there is strong presumption that holder of draft drawn under irrevocable letter of credit is owner of draft and is entitled to proceeds thereof, as long as there is compliance with terms of letter of credit. *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510 (E.D. Pa. 1973).

16. Waiver.

In beneficiary's action for dishonor of draft presented pursuant to letter of credit, fact issue arose whether issuing bank, by authorizing supporting documents to be forwarded through time-consuming domestic collection process, waived condition of timeliness as to presentation of draft and documentation of customer's default on underlying obligation. *Chase Manhattan Bank v. Equibank*, 550 F.2d 882 (3d Cir. Pa. 1977).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 266 F. Supp. 106 (D. Mass. 1967), rev'd on other

grounds, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

17. Other particular applications.

Iranian bank will be enjoined from making payment on two bank guarantees obtained by American company in favor of "Imperial Government of Iran" without first notifying plaintiff company in writing of receipt of demand for payment and giving plaintiff 10 days in which to provide evidence as to lack of authenticity or fraudulent nature of demand since under present circumstances in Iran, there is serious risk that fraudulent or nonauthentic demand could be issued on guaranty since it is clear that Imperial Government has ceased to function and views of current government with respect to contract in question may be completely in conflict with former imperial government. *Stromberg-Carlson Corp. v. Bank Melli Iran*, 467 F. Supp. 530 (S.D.N.Y. 1979).

It is error for a court to read the existence of certain conditions into a letter of credit on the basis of the underlying agreement between the beneficiary and the issuer's customer. The essence of a letter of credit is a promise by the issuer to pay money, and the key to the letter's uniqueness and vitality is that the promise of the issuer, under UCC § 5-114, is independent of any underlying contract. The beneficiary's noncompliance with the underlying contract does not affect the issuer's liability, unless a reference to the underlying contract explicitly creates a condition for honoring a draft. General references to underlying agreements are surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of a letter of credit. *Pringle-Associated Mtg. Corp. v. Southern Nat'l Bank*, 571 F.2d 871 (5th Cir. 1978).

Where irrevocable letter of credit provided that drafts on credit were to be accompanied by signed certifications that amount drawn was required to cover loan imbalance, where beneficiary submitted proper certification to that effect but demand for payment was not in compliance with credit inasmuch as no draft was presented, and where issuer refused pay-

ment solely on grounds that work had terminated on construction project and that certification was ambiguous, but raised no objection that call in beneficiary's demand while asserting other grounds precluded issuer from relying on this defense to beneficiary's suit to enforce payment against letter of credit. *Dovenmuehle, Inc. v. East Bank*, 38 Colo. App. 507, 563 P.2d 24 (1977), *aff'd*, 196 Colo. 422, 589 P.2d 1361 (1978).

Where beneficiary of irrevocable letter of credit alleged that on day letter of credit expired issuing bank requested formal sight draft and letter evidencing customer's default, but agreed that these documents could be forwarded through domestic collections, though it was common knowledge in banking business that such delivery would entail delay of several days, and where issuing bank dishonored draft when it received it 10 days later because of late presentation of draft and documents, it could be found that issuing bank had modified terms of letter of credit and granted extension of time for presentation of required documents notwithstanding customer did not consent to such

modification. *Chase Manhattan Bank v. Equibank*, 550 F.2d 882 (3d Cir. Pa. 1977).

In action by beneficiary of letter of credit against issuer to recover sum due under letter, where evidence showed that beneficiary, on receipt of certified check for \$40,000 from person procuring letter's issuance, had posted \$40,000 bond to vacate *lis pendens* filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the \$40,000 certified check to procurer of letter; and beneficiary had not made payment on real estate bond, since under UCC § 5-103(1)(a), issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrance of liability under such bond; and (3) issuer's claim that beneficiary's release of collateral (the \$40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. *Travelers Indem. Co. v. Flushing Nat'l Bank*, 90 Misc. 2d 964 (1977).

RESEARCH REFERENCES

ALR. What constitutes compliance of documents presented with terms of letter of credit so as to require honor of draft under UCC § 5-114. 8 A.L.R.5th 463.

Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentation under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 11 Am. Jur. 2d, Banks § 993, 996; 50 Am. Jur. 2d, Letters of Credit §§ 35, 41, 42.

Issuer's obligation to its customer, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of

Credit, Forms 5:41-5:45.

Honor and dishonor; issuer's duty to honor, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:101-5:107.

Honor and dishonor; reimbursement of issuer, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:121, 5:122.

Honor and dishonor; wrongful dishonor; anticipatory repudiation, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit Forms, 5:133, 5:135.

CJS. 10 C.J.S., Bills and Notes §§ 203-206, 211.

§ 75-5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of

forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) A beneficiary, issuer or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) All of the conditions to entitle a person to the relief under the law of this state have been met; and

(4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

SOURCES: Laws, 1996, ch. 460, § 10, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-109 [Codes, 1942, § 41A:5-109; Laws, 1966, ch. 316, § 5-109, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Payment by buyer before inspection, see § 75-2-512.

Issuer's rights and obligations, see § 75-5-108.

Warranties, see § 75-5-110.

Transfers of letters of credit by operation of law, see § 75-5-113.

RESEARCH REFERENCES

ALR. What constitutes forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1)(2). 25 A.L.R.4th 239.

Am Jur. 10 Am. Jur. 2d, Banks § 21.

50 Am. Jur. 2d, Letters of Credit §§ 19, 35, 41, 42, 72, 73.

67A Am. Jur. 2d, Sales § 976, 979.

CJS. 10 C.J.S., Bills and Notes § 211.

§ 75-5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

(1) To the issuer, any other person to whom presentation is made, and

the applicant that there is no fraud or forgery of the kind described in Section 75-5-109(a); and

(2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) are in addition to warranties arising under Chapters 3, 4, 7 and 8 because of the presentation or transfer of documents covered by any of those articles.

SOURCES: Laws, 1996, ch. 460, § 11, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-110 [Codes, 1942, § 41A:5-110; Laws, 1966, ch. 316, § 5-110, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Warranties on presentment and transfer of commercial paper, see § 75-3-417.

Warranties of customer and collecting bank on transfer or presentment of items, see § 75-4-207.

Issuer's rights and obligations, see § 75-5-108.

Warranties of person negotiating or transferring document of title, see § 75-7-507.

Warranties of collecting bank as to documents of title, see § 75-7-508.

Warranties on presentment and transfer of investment security, see § 75-8-306.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 993-996; 50 Am. Jur. 2d, Letters of Credit § 36.

Warranties on transfer and present-

ment, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:71-5:73.

CJS. 10 C.J.S., Bills and Notes §§ 203, 204, 207, 209.

§ 75-5-111. Remedies.

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the

applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b).

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b) or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

SOURCES: Laws, 1996, ch. 460, § 12, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-111 [Codes, 1942, § 41A:5-111; Laws, 1966, ch. 316, § 5-111, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

JUDICIAL DECISIONS

1. In general.

Under UCC § 5-115, any recovery of damages by the beneficiary of a letter of credit for the issuer's dishonor of the credit must be reduced by any amount that is realized by resale or other use or disposition of the subject matter of the transaction. In the sale-of-goods context that historically gave rise to the use of letters of credit, the documents that comprise the subject matter of the credit transaction between the issuing bank and the beneficiary often constitute something of significant value. In such circumstances, the beneficiary must either resell the documents, thus reducing his recovery of damages from the issuer, or turn them over to the issuer on payment of the judgment, thus giving the issuer something of value. However, in a case involving a "clean" guaranty letter of credit that deals only with a financial arrangement of pure

credit, which is an area into which the use of letters of credit has recently expanded, the provision in UCC § 5-115 for "resale or other use or disposition of the subject matter of the transaction" does not apply to reduce the beneficiary's recovery of the face value of the credit, plus interest, as damages for the issuer's wrongful dishonor of the credit. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

A release agreement between the beneficiary and the customer as to the underlying transaction does not affect the issuer's obligation on a letter of credit, unless the release agreement explicitly states that the beneficiary has consented to revocation of the credit. The issuing bank may assert the beneficiary's release of the customer as a defense only if the bank is in the position of a surety. The issuing bank, however, is not a surety or guaran-

tor with regard to the customer's obligation. The bank engages its own credit in the first instance by guaranteeing payment when it issues a credit, and its obligation to the beneficiary is completely independent of the underlying transaction between the customer and the beneficiary. Since the issuer's obligation to the beneficiary is a primary and independent obligation, a release or cancellation of the underlying debt, by itself, will not affect the bank's obligation. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 26 U.C.C. Rep. Serv. 750, 2 A.L.R.4th 650 (Me. 1978) (applying UCC § 5-106 and holding, where release agreement between beneficiary and customer made no reference to any consent by beneficiary to revocation of letter of credit, that issuing bank was liable for wrongful dishonor of such credit and that beneficiary, under UCC § 5-115(1) could recover face value thereof from issuer as damages).

In action by beneficiary against issuer to recover on irrevocable letter of credit issued in connection with construction loan agreement between beneficiary as lender and two individuals as borrowers, under UCC §§ 5-114 and 5-115 purported modification of loan contract occurring when individuals formed corporation to complete construction project was immaterial to issuer's liability to beneficiary since individuals, as customers designated in credit, remained original customers and formation of corporation affected only relationship between beneficiary and debtor; thus, evidence offered by issuer to prove intent of parties to loan contract or custom and usage regarding financing of project was properly excluded under UCC §§ 1-205(4) and 5-109. *Dovenmuehle, Inc. v. East Bank*, 38 Colo. App. 507, 563 P.2d 24 (1977), *aff'd*, 196 Colo. 422, 589 P.2d 1361 (1978).

Where (1) bank issued irrevocable letter of credit on application of bank's customer which specified that bank would honor drafts drawn by beneficiary on condition that such drafts be accompanied by beneficiary's signed statement that liquidated-damages deposit, provided for in underlying mortgage-loan transaction between beneficiary and bank's customer, was due beneficiary, and (2) where bank

subsequently dishonored beneficiary's sight draft for amount of such deposit, which was accompanied by required signed statement of beneficiary, on ground that liquidated damages provision in underlying mortgage transaction was unenforceable penalty, bank was liable under UCC § 5-115 for face amount of draft and interest from date of dishonor, since underlying mortgage transaction between beneficiary and bank's customer was entirely separate from letter-of-credit arrangement between beneficiary and bank, and bank should have honored draft which complied with terms of letter-of-credit without questioning validity of provision in underlying mortgage transaction. *New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co.*, 173 Conn. 492, 378 A.2d 562 (1977).

In action against insurer of irrevocable letter of credit which was dishonored on presentation, seeking damages including attorneys' fees, where no provision for attorneys' fees was found in letter of credit, UCC §§ 5-115 and 2-710 were not intended to afford vehicle for award of attorneys' fees either as costs or as "commercially reasonable charges, expenses or commissions." *Florida Nat'l Bank v. Alfred & Ann Goldstein Found., Inc.*, 327 So. 2d 110 (Fla. App. 1976).

In action by Israeli partnership, as beneficiary of irrevocable letter of credit established by defendant Ugandan bank, defendant's instructions to its New York agent bank to refrain from effecting reimbursement of checks drawn under letter, which were communicated to agent before drafts drawn against letter were presented, and before expiration of letter, constituted anticipatory breach of contract, and defendant became liable for damages caused beneficiary. *J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 333 N.E.2d 168 (1975), *cert. denied*, 423 U.S. 866, 96 S. Ct. 126, 46 L. Ed. 2d 95 (1975).

Where irrevocable letter of credit provided for its termination or cancellation upon receipt by issuing bank of affidavit that one or more events enumerated in building contract had occurred, bank was not justified in refusing payment upon receipt of an affidavit which did not

specify the event or events which had occurred. *Fair Pavilions, Inc. v. First Nat'l City Bank*, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 993, 996.

15A Am. Jur. 2d, Commercial Code § 67.

50 Am. Jur. 2d, Letters of Credit §§ 20, 36.

CJS. 10 C.J.S., Bills and Notes §§ 202, 211.

§ 75-5-112. Transfer of letter of credit.

(a) Except as otherwise provided in Section 75-5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) The transfer would violate applicable law; or

(2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in Section 75-5-108(e) or is otherwise reasonable under the circumstances.

SOURCES: Laws, 1996, ch. 460, § 13, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-112 [Codes, 1942, § 41A:5-112; Laws, 1966, ch. 316, § 5-112, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Assignment of rights under contract for sale of goods, see § 75-2-210.

Issuer's rights and obligations, see § 75-5-108.

JUDICIAL DECISIONS

1. In general.

Where irrevocable letter of credit was issued by bank at customer's request in favor of insurance company that subsequently went into liquidation, and where state insurance superintendent issued sight draft against such letter to obtain transfer of funds evidenced by letter for use in beneficiary's liquidation proceedings, fact that UCC § 5-116 provides that right to draw under a credit can be transferred or assigned only if the credit is expressly designated as transferrable or assignable, and further fact that letter of credit in issue was not so designated, did

not prevent insurance superintendent from intervening in customer's suit to enjoin bank from honoring superintendent's sight draft, since UCC § 5-116 was intended to apply to letters of credit used to secure performance in commercial transactions involving manufacturer of goods and was not intended to apply to situation where, as in present case, letter of credit was used to secure deficits arising under profit-commission contract. *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 371 N.E.2d 1127 (1st Dist. 1977), aff'd and remanded, 76 Ill. 2d 139, 28 Ill. Dec. 535, 390 N.E.2d 894 (1979).

RESEARCH REFERENCES

- ALR.** Who may enforce guaranty. 41 A.L.R.2d 1213.
- Am Jur.** 11 Am. Jur. 2d, Banks §§ 993-996.
- 11 Am. Jur. 2d, Bills and Notes §§ 337-340.
- 50 Am. Jur. 2d, Letters of Credit §§ 21, 22.
- Transfer and assignment, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:152-5:154.
- CJS.** 10 C.J.S., Bills and Notes § 208.

§ 75-5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Section 75-5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in Section 75-5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 75-5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

SOURCES: Laws, 1996, ch. 460, § 14, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-113 [Codes, 1942, § 41A:5-113; Laws, 1966, ch. 316, § 5-113, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Laws, 1996, ch. 460, §§ 28, 29, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

“SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.”

Cross References — Transfers of letters of credit, generally, see § 75-5-112.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 993, 996.
50 Am. Jur. 2d, Letters of Credit § 83.

67A Am. Jur. 2d, Sales § 1002.
CJS. 10 C.J.S., Bills and Notes § 208.

§ 75-5-114. Assignment of proceeds.

(a) In this section, “proceeds of a letter of credit” means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary’s drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary’s assignment of the proceeds of a letter of credit and are superior to the assignee’s right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer’s or nominated person’s payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary’s rights to proceeds is governed by Chapter 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary’s right to proceeds and its perfection are governed by Chapter 9 or other law.

SOURCES: Laws, 1996, ch. 460, § 15, eff from and after July 1, 1996.

Editor’s Note — Former § 75-5-114 [Codes, 1942, § 41A:5-114; Laws, 1966, ch. 316, § 5-114; 1990, ch. 384, § 46, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Laws, 1996, ch. 460, §§ 28, 29, provide as follows:

“SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

“SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.”

Cross References — Liberal administration of remedies provided by this code, see § 75-1-106.

Anticipatory repudiation of contract for sale of goods, see § 75-2-610.

Retraction of anticipatory repudiation of contract for sale of goods, see § 75-2-611.

Remedies of seller, see §§ 75-2-702 et seq.

Seller's right to identify goods to contract notwithstanding breach or to salvage unfinished goods, see § 75-2-704.

Seller's stoppage of delivery in transit or otherwise see § 75-2-705.

Seller's resale including contract for resale, see § 75-2-706.

What constitutes, and rights of, person in position of seller of goods, see § 75-2-707.

Seller's incidental damages, see § 75-2-710.

Holder in due course of commercial paper, see § 75-3-302.

Scope of chapter, see § 75-5-103.

Modification or revocation of credit, see § 75-5-106.

Issuer's obligations, see § 75-5-108.

Transfer or assignment of right to draw under credit, see §§ 75-5-112, 75-5-113.

Manner of negotiating document of title, see § 75-7-501.

Bona fide purchaser of investment security, see § 75-8-302.

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 993, 996.

50 Am. Jur. 2d, Letters of Credit §§ 75-79.

67 Am. Jur. 2d, Sales §§ 976, 979, 1310, 1329.

Wrongful dishonor; anticipatory repudiation, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:131-5:135.

§ 75-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this chapter must be commenced within one (1) year after the expiration date of the relevant letter of credit or one (1) year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

SOURCES: Laws, 1996, ch. 460, § 16, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-115 [Codes, 1942, § 41A:5-115; Laws, 1966, ch. 316, § 5-115, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 75-79. **CJS.** 10 C.J.S., Bills and Notes §§ 208, 211.
 68A Am. Jur. 2d, Secured Transactions § 13.

§ 75-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 75-5-104 or by a provision in the person's letter of credit, confirmation or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation or other undertaking is expressly made subject. If (i) this chapter would govern the liability of an issuer, nominated person or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 75-5-103(c).

(d) If there is conflict between this chapter and Chapters 3, 4, 4A or 9, this chapter governs.

(e) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

SOURCES: Laws, 1996, ch. 460, § 17, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-116 [Codes, 1942, § 41A:5-116; Laws, 1966, ch. 316, § 5-116; 1977, ch. 452, § 4, eff from and after April 1, 1978] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Territorial application of code and parties' power to choose applicable law, see § 75-1-105.

RESEARCH REFERENCES

Am Jur. 50 *Am. Jur. 2d*, Letters of Credit §§ 21, 22, 35, 58-60.
CJS. 10 *C.J.S.*, Bills and Notes §§ 5, 9.
 68A *Am. Jur. 2d*, Secured Transactions
 §§ 16, 39-41, 542-546.

§ 75-5-117. Subrogation of issuer, applicant and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) The applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense or excuse.

SOURCES: Laws, 1996, ch. 460, § 18, eff from and after July 1, 1996.

Editor's Note — Former § 75-5-117 [Codes, 1942, § 41A:5-117; Laws, 1966, ch. 316, § 5-117, eff March 31, 1968] was repealed by Laws, 1996, ch. 460, § 27, eff from and after June 30, 1996.

Cross References — Scope of chapter see § 75-5-103.

Issuer's rights and obligations, see § 75-5-108.

RESEARCH REFERENCES

Am Jur. 50 *Am. Jur. 2d*, Letters of Credit § 82.

§ 75-5-118. Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9 of the Uniform Commercial Code, but:

(1) A security agreement is not necessary to make the security interest enforceable under Section 75-9-203(b)(3);

(2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

SOURCES: Laws, 2001, ch. 495, § 3, eff from and after Jan. 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

CHAPTER 6

Uniform Commercial Code—Bulk Transfers

SEC.

75-6-101 through 75-6-111. Repealed.

75-6-112. Repeal of Sections 75-6-101 through 75-6-111.

§§ 75-6-101 through 75-6-111. Repealed.

Repealed by Laws, 1994, ch. 337, § 1, eff from and after July 1, 1995.

§ 75-6-101. [Codes, 1942, § 41A:6-101; Laws, 1966, ch. 316, § 6-101, eff March 31, 1968]

§ 75-6-102. [Codes, 1942, § 41A:6-102; Laws, 1966, ch. 316, § 6-102, eff March 31, 1968]

§ 75-6-103. [Codes, 1942, § 41A:6-103; Laws, 1966, ch. 316, § 6-103, eff March 31, 1968]

§ 75-6-104. [Codes, 1942, § 41A:6-104; Laws, 1966, ch. 316, § 6-104, eff March 31, 1968]

§ 75-6-105. [Codes, 1942, § 41A:6-105; Laws, 1966, ch. 316, § 6-105, eff March 31, 1968]

§ 75-6-106. [Codes, 1942, § 41A:6-106; Laws, 1966, ch. 316, § 6-106, eff March 31, 1968]

§ 75-6-107. [Codes, 1942, § 41A:6-107; Laws, 1966, ch. 316, § 6-107, eff March 31, 1968]

§ 75-6-108. [Codes, 1942, § 41A:6-108; Laws, 1966, ch. 316, § 6-108, eff March 31, 1968]

§ 75-6-109. [Codes, 1942, § 41A:6-109; Laws, 1966, ch. 316, § 6-109, eff March 31, 1968]

§ 75-6-110. [Codes, 1942, § 41A:6-110; Laws, 1966, ch. 316, § 6-110, eff March 31, 1968]

§ 75-6-111. [Codes, 1942, § 41A:6-111; Laws, 1966, ch. 316, § 6-111, eff March 31, 1968]

Editor's Note — Former §§ 75-6-101 to 75-6-111 provided for the regulation of bulk transfers.

§ 75-6-112. Repeal of Sections 75-6-101 through 75-6-111.

Section 75-6-101 through Section 75-6-111, Mississippi Code of 1972, shall stand repealed from and after July 1, 1995.

SOURCES: Laws, 1994, ch. 337, § 1, eff from and after passage (approved March 14, 1994).

CHAPTER 7

Uniform Commercial Code—Documents of Title

Part 1.	General.....	75-7-101
Part 2.	Warehouse Receipts: Special Provisions.....	75-7-201
Part 3.	Bills of Lading: Special Provisions.....	75-7-301
Part 4.	Warehouse Receipts and Bills of Lading: General Obligations.....	75-7-401
Part 5.	Warehouse Receipts and Bills of Lading: Negotiation and Transfer.....	75-7-501
Part 6.	Warehouse Receipts and Bills of Lading Miscellaneous Provisions.....	75-7-601

PART 1.

GENERAL.

SEC.	
75-7-101.	Short title.
75-7-102.	Definitions and index of definitions.
75-7-103.	Relation of chapter to treaty, statute, tariff, classification or regulation.
75-7-104.	Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.
75-7-105.	Construction against negative implication.

§ 75-7-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code—Documents of Title.

SOURCES: Codes, 1942, § 41A:7-101; Laws, 1966, ch. 316, § 7-101, eff March 31, 1968.

Cross References — General regulation of farm warehouses, see §§ 75-43-1 et seq.
Regulation of grain warehouses, see §§ 75-44-1 et seq.
Delivery of valid warehouse receipt excluding sale of cemetery merchandise from provisions of cemetery merchandise law, see § 75-63-19.

JUDICIAL DECISIONS

1. In general.	Interstate shipments are governed by the federal Bills of Lading Act. G.A.C. Com. Corp. v. Wilson, 271 F. Supp. 242 (S.D.N.Y. 1967).
Article 7 applies to intrastate shipments. G.A.C. Com. Corp. v. Wilson, 271 F. Supp. 242 (S.D.N.Y. 1967).	

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 7, dealing with warehouse receipts, bills of lading, and other documents of title. 21 A.L.R.3d 1339.	Am Jur. 13 Am. Jur. 2d, Carriers §§ 323 et seq. 15A Am. Jur. 2d, Commercial Code §§ 35, 38, 40, 41.
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67 Am. Jur. 2d, Sales § 394. 93 C.J.S., Warehousemen and Safe De-
 78 Am. Jur. 2d, Warehouses §§ 27 et positaries §§ 23 et seq.
 seq.
 CJS. 13 C.J.S., Carriers §§ 390, 391,
 393.

§ 75-7-102. Definitions and index of definitions.

(1) In this chapter, unless the context otherwise requires:

(a) "Bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them.

(b) "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.

(c) "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.

(d) "Delivery order" means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bill of lading.

(e) "Document" means document of title as defined in the general definitions in Chapter 1 (Section 1-201) [§ 75-1-201].

(f) "Goods" means all things which are treated as movable for the purposes of a contract of storage or transportation.

(g) "Issuer" means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.

(h) "Warehouseman" is a person engaged in the business of storing goods for hire.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Duly negotiate." Section 7-501 [§ 75-7-501].

"Person entitled under the document." Section 7-403(4) [§ 75-7-403(4)].

(3) Definitions in other chapters applying to this chapter and the sections in which they appear are:

"Contract for sale." Section 2-106 [§ 75-2-106].

"Overseas." Section 2-323 [§ 75-2-323].

"Receipt" of goods. Section 2-103 [§ 75-2-103].

(4) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:7-102; Laws, 1966, ch. 316, § 7-102, eff March 31, 1968.

Cross References — Liability for nonreceipt or misdescription, see §§ 75-7-203, 75-7-301.

JUDICIAL DECISIONS

1. In general.

Under the provisions of GL c 106, § 7-102(1)(h) the fact that a boat was stored by a marina out-of-doors rather than in a warehouse or similar structure does not mean that the bailee was not a “warehouseman” since, regardless of where he kept the boat, he was a person engaged in the business of storing goods for hire. *Fireman’s Fund Am. Ins. Co. v. Captain Fowler’s Marina, Inc.*, 343 F. Supp. 347 (D. Mass. 1971).

Operator of garage and body shop, who

at request of police officer towed plaintiff’s automobile from scene of accident and refused to deliver vehicle to plaintiff unless towing and storage charges were paid, had no warehouseman’s lien for such charges under UCC § 7-209(1), since mere garage keeper is not warehouseman within meaning of UCC § 7-102(1)(h). *Candler v. Ash*, 53 Ohio App. 2d 134, 372 N.E.2d 617 (1976) (noting, in holding operator liable for conversion of plaintiff’s vehicle, that operator had not issued any warehouse receipt for vehicle).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers § 324.

15A Am. Jur. 2d, Commercial Code § 36.

67 Am. Jur. 2d, Sales § 394.

78 Am. Jur. 2d, Warehouses §§ 2, 28.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Forms 1:26-1:33 (definitions and principles of interpretation; instruction to jury).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:3, 7:7 (definitions).

CJS. 13 C.J.S., Carriers § 390.

77 C.J.S., Sales §§ 2-4.

93 C.J.S., Warehousemen and Safe Depositaries §§ 1, 2.

§ 75-7-103. Relation of chapter to treaty, statute, tariff, classification or regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this state or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this chapter are subject thereto.

SOURCES: Codes, 1942 § 41A:7-103; Laws, 1966, ch. 316, § 7-103, eff March 31, 1968.

Cross References — Duty of care, contractual limitation of liability, see §§ 75-7-204, 75-7-309.

Storage under government bond, see § 75-7-201.

Form and terms of warehouse receipts, see § 75-7-202.

Termination of storage, see § 75-7-206.

Irregularities in issue of receipt or bill of lading, see § 75-7-401.

Obligation to deliver; excuse, see § 75-7-403.

JUDICIAL DECISIONS

1. In general.

Contention by plaintiff warehousemen that certain rules adopted by Arkansas

Transportation Commission to govern household goods carriers violated Arkansas Uniform Commercial Code could not

be sustained, since Arkansas UCC § 7-103 expressly made provisions of Arkansas UCC Article 7 subject to state's regulatory statutes and also to tariffs, classifications, or regulations that might be filed or issued under such statutes. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978) (observing that as result of Arkansas UCC § 7-103, no conflict existed between rules complained of and Arkansas UCC Article 7).

Fact that contract between shipper and time charterer stated that it was to be

governed by New York law, and UCC § 7-309(2), as adopted in New York, allowed carrier to limit liability to value stated in bill of lading only when carrier's rates were dependent on value, did not affect time charterer's entitlement to damage limitation contained in Carriage of Goods by Sea Act in light of UCC § 7-103 making UCC subject to any treaty or statute of the United States. *Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser*, 507 F.2d 68 (2d Cir. N.Y. 1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975) (involving New York law).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 164-167, 172, 323.

15A Am. Jur. 2d, Commercial Code §§ 35, 38, 40, 41.

67 Am. Jur. 2d, Sales §§ 394, 395, 411 et seq.

78 Am. Jur. 2d, Warehouses §§ 27 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Ware-

house Receipts, Form 7:1 (complaint, petition, or declaration; allegation; bailee subject to statute or regulation).

6 Am. Jur. Pl & Pr Forms (Rev ed), Warehouse Receipts, Form 7:2 (answer; defense; transaction governed by administrative regulation).

CJS. 13 C.J.S., Carriers §§ 3, 14, 351, 356-366, 373, 390.

§ 75-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

(1) A warehouse receipt, bill of lading or other document of title is negotiable

(a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

SOURCES: Codes, 1942, § 41A:7-104; Laws, 1966, ch. 316, § 7-104, eff March 31, 1968.

Cross References — Rights acquired by due negotiation, see § 75-7-502.

Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

Negotiable farm warehouse receipts, see § 75-43-11.

JUDICIAL DECISIONS

1. In general.

Warehouse receipts providing that on return thereof one bale of cotton would be delivered to “above named depositor or its order, or bearer” were negotiable as bearer documents of title under UCC § 7-104(1)(a), as against contention that if both “order” language and “bearer” language appeared on face of such instruments they would be nonnegotiable, and such receipts were “duly negotiated” to holders thereof within meaning of UCC § 7-501(4) where no evidence was produced to show that holders had not paid value for receipts, or that transaction was not in regular course of business, or that holders had had actual notice of any claims to receipts or had not acted in good faith. *R.E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

In action by cotton farmers to enjoin

defendants from removing 1,640 bales of cotton from warehouse of one defendant, where evidence showed that plaintiffs had sold warehouse receipts representing such cotton to buyer who paid for receipts by subsequently dishonored checks, and that such buyer later sold receipts to defendants who were unaware that plaintiffs had not been paid therefor, temporary injunction issued by trial court would be dissolved for failure of plaintiffs to establish probable right of recovery, since such receipts were negotiable as bearer paper under UCC § 7-104(1)(a) and UCC § 7-501(2)(a) and had been duly negotiated to defendants in compliance with UCC § 7-501(4), so as to give defendants under UCC § 7-502(b) title to cotton represented by receipts. *R.E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 15, 26, 30.

13 Am. Jur. 2d, Carriers §§ 324, 358 et seq.

15A Am. Jur. 2d, Commercial Code §§ 53 et seq.

67 Am. Jur. 2d, Sales §§ 394, 395, 411 et seq.

78 Am. Jur. 2d, Warehouses §§ 31, 37.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:28 (instruction to jury; “document of title” defined).

6 Am. Jur. Pl & Pr Forms (Rev), Ware-

house Receipts, Forms 7:361 et seq (form of negotiation; requirements of “due negotiation”).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2561 et seq. (storage and transportation of goods, generally).

CJS. 13 C.J.S., Carriers §§ 390 et seq. 80 C.J.S., Shipping §§ 256 et seq.

93 C.J.S., Warehousemen and Safe Depositories §§ 23 et seq.

§ 75-7-105. Construction against negative implication.

The omission from either Part 2 or Part 3 of this chapter of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable.

SOURCES: Codes, 1942, § 41A:7-105; Laws, 1966, ch. 316, § 7-105, eff March 31, 1968.

Cross References — Special provisions respecting warehouse receipts, see §§ 75-7-201 et seq.

Special provisions respecting bills of lading, see §§ 75-7-301 et seq.

RESEARCH REFERENCES

- Am Jur.** 13 **Am. Jur.** 2d, Carriers 78 **Am. Jur.** 2d, Warehouses § 27.
 § 323. **CJS.** 82 C.J.S., Statutes § 358, 359,
 67 **Am. Jur.** 2d, Sales § 394. 361.

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

SEC.

- 75-7-201. Who may issue a warehouse receipt; storage under government bond.
 75-7-202. Form of warehouse receipt; essential terms; optional terms.
 75-7-203. Liability for nonreceipt or misdescription.
 75-7-204. Duty of care; contractual limitation of warehouseman's liability.
 75-7-205. Title under warehouse receipt defeated in certain cases.
 75-7-206. Termination of storage at warehouseman's option.
 75-7-207. Goods must be kept separate; fungible goods.
 75-7-208. Altered warehouse receipts.
 75-7-209. Lien of warehouseman.
 75-7-210. Enforcement of warehouseman's lien.

§ 75-7-201. Who may issue a warehouse receipt; storage under government bond.

(1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

SOURCES: Codes, 1942, § 41A:7-201; Laws, 1966, ch. 316, § 7-201, eff March 31, 1968.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

Application of obligations imposed by this chapter, see § 75-7-401.

Farm warehouse receipts, see § 75-43-11.

Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

JUDICIAL DECISIONS

A. Decisions Under Former Statutes.

1. In general.

A. Decisions Under Former Statutes.

1. In general.

The prime purpose of Uniform Warehouse Receipts Act is to make standard receipts issued by warehousemen for chattels documents of title so that honest purchasers will be protected as purchas-

ers in good faith. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Validity of attempted gift causa mortis made by decedent, who was resident of Mississippi, of cotton in compress located in sister state, and for which decedent held negotiable warehouse receipts, held governed by law applicable in Mississippi. *Gidden v. Gidden*, 176 Miss. 98, 167 So. 785 (1936).

RESEARCH REFERENCES

- Am Jur.** 78 Am. Jur. 2d, Warehouses § 29.
 6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:61 (warehouse receipts; special provisions; who may issue; storage under government bond).
CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 25 et seq.

§ 75-7-202. Form of warehouse receipt; essential terms; optional terms.

(1) A warehouse receipt need not be in any particular form.

(2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:

- (a) the location of the warehouse where the goods are stored;
- (b) the date of issue of the receipt;
- (c) the consecutive number of the receipt;
- (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
- (e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;
- (f) a description of the goods or of the packages containing them;
- (g) the signature of the warehouseman, which may be made by his authorized agent;
- (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
- (i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (Section 7-209) [§ 75-7-209]. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this code and do not impair his obligation of delivery (Section 7-403) [§ 75-7-403] or his duty of care (Section 7-204) [§ 75-7-204]. Any contrary provisions shall be ineffective.

SOURCES: Codes, 1942, § 7-202; Laws, 1966, ch. 316, § 7-202, eff March 31, 1968.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

Additional terms of warehouse receipts of grain warehouses, see § 75-44-49.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

Where contract for sale of cotton provided that risk of loss remained with seller until warehouse receipts "are issued" or "have been issued" and where cotton was burned after delivery to buyer, but one day prior to completion and issuance of warehouse receipts, words in contract relating to "issue", pursuant to definition in UCC § 3-102, meant that warehouse receipts not only must have been complete in form and signed as required by UCC § 7-202, but must have been delivered to seller; thus, seller was entitled to entire proceeds of insurance settlement since loss occurred prior to time warehouse receipts were issued. *Livingston v. Hohenberg Bros. Co.*, 341 So. 2d 104 (Miss. 1976).

Exculpatory provision in rate schedule agreement relieving warehouseman from liability for damages to stored goods from perils against which bailor had secured insurance was invalid under UCC § 7-202(3), making ineffective any attempt to impair warehouseman's duty of care un-

der UCC § 7-204. *Kimberly-Clark Corp. v. Lake Erie Whse.*, 49 A.D.2d 492 (4th Dep't 1975), appeal dismissed, 39 N.Y.2d 888, 386 N.Y.S.2d 393, 352 N.E.2d 580 (1976).

Warehouseman who issued non-negotiable warehouse receipt covering household goods in names of husband "and/or" wife and delivered receipt to wife, but who released goods to husband's agent on written authorization bearing wife's forged signature, was liable to wife as a matter of law for failing to require third party to produce warehouse receipt. *Turner v. Scobey Moving & Storage Co.*, 515 S.W.2d 253 (Tex. 1974).

Where yacht was partially destroyed by fire at marina, clause in yacht storage contract exculpating defendant from liability for damage to yacht "no matter how occasioned" was invalid under Code provision declaring ineffective terms inserted by warehouseman in contract which impair his duty of care. *Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc.*, 343 F. Supp. 347 (D. Mass. 1971) (applying Massachusetts law).

B. Pre-Uniform Commercial Code Decisions.

2. In general.

The prime purpose of Uniform Warehouse Receipts Act is to make standard receipts issued by warehousemen for chattels documents of title so that honest purchasers will be protected as purchasers in good faith. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

RESEARCH REFERENCES

ALR. Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses § 31.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:71, 7:72 (warehouse receipts; special provisions; form and contents).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2601 et seq. (form of warehouse receipt; essential terms; optional terms).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 27, 28.

§ 75-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition, or the receipt or description is qualified by “contents, condition and quality unknown,” “said to contain” or the like, if such indication be true, or the party or purchaser otherwise has notice.

SOURCES: Codes, 1942, § 41A:7-203; Laws, 1966, ch. 316, § 7-203, eff March 31, 1968.

Cross References — Liability of issuer of bill of lading for nonreceipt or misdescription, see § 75-7-301.

Issuer's liability for damages caused by overissue or failure to identify duplicate document as such, see § 75-7-402.

Obligation of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

JUDICIAL DECISIONS

1. In general.

Bank was not entitled under UCC § 7-203 to recover for value of corn allegedly represented by 13 negotiable warehouse receipts where evidence sustained trial court's finding that bank did not take receipts in good faith and without notice that they had been fraudulently issued without any corn ever having been received for them. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (affirming trial court's judgement as to all defendants, but withdrawing former opinion rendered in case).

Cause of action for nonreceipt of goods inures exclusively to the party or to the

purchaser for value of the warehouse receipt. *Sloan v. Clark*, 18 N.Y.2d 570, 223 N.E.2d 893 (1966).

Liability under this section was applied against warehouseman issuing receipts for oil where it could not be ascertained whether such oil was ever deposited with him or whether it was deposited and later wrongfully removed. *National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp.*, 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, *Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses § 33.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:82-7:83 (liability of warehouseman; nonreceipt or misdescription).

19 Am. Jur. Legal Forms 2d, Uniform

Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2621, 253:2622 (liability for nonreceipt or misdescription).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 27, 28.

§ 75-7-204. Duty of care; contractual limitation of warehouseman's liability.

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

SOURCES: Codes, 1942, § 41A:7-204; Laws, 1966, ch. 316, § 7-204, eff March 31, 1968.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.
2. Duty of care.
3. —Independent contractors.
4. Extent and nature of liability.
5. Limitation of liability.
6. —Terms of receipt.
7. —Conversion to own use.
8. Presentation of claim.

B. Pre-Uniform Commercial Code Decisions.

9. In general.
10. Degree of care.
11. Burden of proof.

A. Decisions Under Uniform Commercial Code.

1. In general.

The provisions set forth in the instant section are generally comparable to those contained in the provision of former Uniform Warehouse Receipts Act relating to the insertion of certain other terms and conditions. *D'Aloisio v. Morton's, Inc.*, 342 Mass. 231, 172 N.E.2d 819 (1961).

2. Duty of care.

In an action by rice farmers against a rice processing facility for damage allegedly caused by improper treatment of rice, the limitation of warranty of quality contained on the receipt issued for each shipment of rice was applicable as a part of the

contract under which the facility received the rice and made it liable only for failure to exercise reasonable care in processing the rice. *Baugh Farms, Inc. v. Smith*, 495 F. Supp. 40 (N.D. Miss. 1980).

UCC § 7-204(1) codifies the common-law rule of negligence that a warehouseman-bailee of goods must exercise due care to safeguard the goods against damage. *S.S. Kresge Co. v. Port of Longview*, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

In action by bailor of household goods against warehouseman to recover value of goods stored which had been damaged by water leakage: (1) although warehouseman alleged that plumbing contractor was negligent in not connecting one of sprinkler system pipes and that this negligence resulted in water leakage which damaged bailor's goods, evidence supported finding that warehouseman breached standard of care contained in UCC § 7-204(1) and was negligent in failing to look at pipes and inspect storage area prior to placing goods; (2) it was error to refuse to admit warehouse receipt for purpose of showing that warehouseman's liability was limited therein to ten cents per pound per article since, *inter alia* UCC § 7-204(2) specifically authorized warehouseman to limit his liability for damages to stored goods. *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132 (1975).

In action by owners of warehoused goods to recover damages for goods destroyed by fire while stored in defendant's warehouse, it was not negligence as matter of law that warehouse did not have night watchman or automatic sprinkling system; furthermore, evidence was sufficient to support finding of jury that warehouseman was not negligent in failing to use reasonable care in inspecting for defects in electrical system. *Barlow Upholstery & Furn. Co. v. Emmel*, 533 P.2d 900 (Utah 1975).

Exculpatory provision in rate schedule agreement relieving warehouseman from liability for damages to stored goods from perils against which bailor had secured insurance was invalid under UCC § 7-202(3), making ineffective any attempt to impair warehouseman's duty of care under UCC § 7-204. *Kimberly-Clark Corp. v.*

Lake Erie Whse., 49 A.D.2d 492 (4th Dep't 1975), appeal dismissed, 39 N.Y.2d 888, 386 N.Y.S.2d 393, 352 N.E.2d 580 (1976).

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and 7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. Ga. 1975) (applying Georgia law).

3. —Independent contractors.

Liability of port as bailee for common-law negligence, as codified by UCC § 7-204(1), for damage to bailor's goods caused by collapse of roof of port's warehouse was supplemented, under UCC § 1-103, by doctrine of strict vicarious liability in tort only to extent that port would be liable for acts of independent contractor over whom port had right of control. *S.S. Kresge Co. v. Port of Longview*, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

Although a warehouseman is not an insurer of the stored goods, he must exercise under UCC § 7-204(1) the same degree of skill and care that a reasonable man would necessarily exercise in the operation of the business in which he is engaged. *F-M Potatoes, Inc. v. Suda*, 259 N.W.2d 487, 23 U.C.C. Rep. Serv. 144 (N.D. 1977) (holding that warehouseman who contracted to provide "conditioned" storage for plaintiff's potatoes was liable for negligently failing to exercise degree of skill and care that reasonable warehouseman would have exercised in providing such storage).

In action by bailor of household goods against warehouseman to recover value of

goods stored which had been damaged by water leakage: (1) although warehouseman alleged that plumbing contractor was negligent in not connecting one of sprinkler system pipes and that this negligence resulted in water leakage which damaged bailor's goods, evidence supported finding that warehouseman breached standard of care contained in UCC § 7-204(1) and was negligent in failing to look at pipes and inspect storage area prior to placing goods. *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132 (1975).

4. Extent and nature of liability.

In breach-of-contract action by lender bank against warehouseman who, under triparty contract, had agreed to use field-warehousing arrangement to monitor "declared value" of debtor's steel inventory, which was collateral for bank's loan to debtor, (1) magistrate's finding that defendant had negligently breached its agreement to maintain bank's minimum "hold figure" on inventory was not clearly erroneous; and (2) bank's claim that defendant was warehouseman or bailee under Article 7 who was liable for fair-market value of steel missing from debtor's inventory at time of its "loss or conversion" could not be maintained because (a) even if defendant's field-warehousing arrangement with bank and debtor were consonant with standard pattern of warehouseman's duties under Article 7, such duties under UCC § 7-204(1) extended only to protection against "loss or destruction" of bailed goods, and (b) in present case, debtor's steel inventory was neither lost nor destroyed. *Merchants & Marine Bank v. Douglas-Guardian Whse. Corp.*, 801 F.2d 742 (5th Cir. 1986).

Warehouseman's duty extends only to protecting against loss or destruction of bailed goods, such that U.C.C. was not applicable to company's failure to properly monitor inventory of steel company to whom bank had made loan. *Merchants & Marine Bank v. Douglas-Guardian Whse. Corp.*, 801 F.2d 742 (5th Cir. 1986).

Warehouseman was liable for sale of plaintiff's property in violation of UCC § 7-210(1) and (2)(f), and plaintiff as matter of law was entitled to damages based on agreed value of property per pound, as permitted by UCC § 7-204(2). However,

plaintiff was not entitled to recover damages for conversion and punitive damages where evidence showed without dispute that erroneous date of sale contained in newspaper notice was result of clerical error not wilfully caused by warehouseman within meaning of UCC 7-210(9). *Long's Transf. & Storage v. Busby*, 358 So. 2d 393 (Miss. 1978).

Warehouseman who issued non-negotiable warehouse receipt covering household goods in names of husband "and/or" wife and delivered receipt to wife, but who released goods to husband's agent on written authorization bearing wife's forged signature, was liable to wife as a matter of law for failing to require third party to produce warehouse receipt. *Turner v. Scobey Moving & Storage Co.*, 515 S.W.2d 253 (Tex. 1974).

5. Limitation of liability.

Connecticut UCC § 7-204(2), dealing with limitation of warehouseman's liability for damages for loss of or injury to stored goods, is merely declaratory of Connecticut common law and was not intended to allow such limitation to become effective unless it had resulted from agreement of parties made under ordinary principles of contract law. Thus, in action for breach of bailment contract brought for defendant's loss of fur coat that plaintiff had placed in storage with defendant, where (1) plaintiff, at time of storing coat, was given receipt on which defendant's employee had written \$100 as value of coat, (2) receipt provided that amount recoverable for loss of or damage to coat should not exceed its actual value, or its cost of repair, or "depositor's valuation" appearing on receipt, whichever was the "least," (3) plaintiff did not read receipt until after loss had occurred, (4) value placed on receipt by defendant's employee was not discussed with plaintiff, and (5) receipt was not signed by either party, plaintiff's conduct did not justify conclusion by reasonable person that plaintiff had consented to limitation of damages contained in receipt. *Carter v. Reichlin Furriers*, 34 Conn. Supp. 661, 386 A.2d 647 (1977).

Warehouseman and common carriers may limit liability to stated value of property. *Allright, Inc. v. Elledge*, 515 S.W.2d

266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

The contractual limitation of a warehouseman's liability is enforceable according to whether an opportunity is given to the depositor of goods to obtain an increased valuation by paying increased rates. *Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 57, 218 N.E.2d 661 (1966), reargument denied, 18 N.Y.2d 751 (1966).

The Uniform Commercial Code appears not to have altered prior law requiring a warehouseman to make an explanation of the injury or loss in the case of bailed merchandise in order to escape liability for nondelivery to the owner. *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

6. —Terms of receipt.

The limitation of warranty of quality contained in the receipts given to drivers delivering rice to a grain elevator is applicable to the extent of its terms; however, the provision that the elevator cannot control the conditions of the harvest and delivery does not relieve the elevator from performing the drying and storage services in a manner consistent with its duty to exercise reasonable care. *Baugh Farms, Inc. v. Smith*, 495 F. Supp. 40 (N.D. Miss. 1980).

In action against warehouseman for conversion of 2,500 pounds of frozen shrimp stored in defendant's warehouse, provision in warehouse receipt issued to plaintiff which limited defendant's liability for nondelivery of such shrimp to fifty cents per pound was not required by UCC § 7-204(2) to be conspicuous. *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647 (Fla. App. 1977), cert. denied, 357 So. 2d 187 (Fla. 1978).

In action by bailor of household goods against warehouseman to recover value of goods stored which had been damaged by water leakage, it was error to refuse to admit warehouse receipt for purpose of showing that warehouseman's liability was limited therein to ten cents per pound per article since, inter alia UCC § 4-204(2) specifically authorized warehouseman to limit his liability for damages to

stored goods. *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132 (1975).

Under UCC §§ 7-204(2) and 7-309(2) warehouseman and common carriers may limit liability to stated value of property. *Allright, Inc. v. Elledge*, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Storage contract fairly spelled out limitation of liability and contained provision for increased charges and additional insurance where excess value is declared; held, there was substantial compliance with statutory requirements for limitation of liability in warehouse receipt. *Dunfee v. Blue Rock Van & Storage, Inc.*, 266 A.2d 187 (Del. Super. 1970).

7. —Conversion to own use.

Phrase "conversion to his own use" in UCC § 7-204(2) is synonymous with "conversion," so as to render limitation of liability contained in nonnegotiable warehouse receipt inapplicable where warehouseman converted the bailed goods. *Lipman v. Petersen*, 223 Kan. 483, 575 P.2d 19 (1978).

8. Presentation of claim.

A provision in a warehouse receipt requiring the customer to file a claim in writing within 30 days after written notice of the damage is mailed to the customer at his last known address is not unreasonable or oppressive. *United States Fid. & Guar. Co. v. Mooney's Moving & Storage, Inc.*, 16 Pa. D. & C.2d 668 (1959).

B. Pre-Uniform Commercial Code Decisions.

9. In general.

One who leaves cotton at a gin is given the gin ticket and told to come back later for the compress warehouse receipt and cotton sample, according to custom, is not estopped to recover the value of a bale of cotton never accounted for by a notation on the gin ticket "Not responsible for cotton left at gin" or by his failure to take his bale home when it would have been impossible for him to have found it among the other bales. *Smith v. Farmers Ginning Ass'n*, 201 Miss. 573, 29 So. 2d 663 (1947).

Oral contract by warehouseman to procure fire insurance on stored household goods was enforceable and not void as against public policy, and for breach thereof warehouseman was liable for destruction of the goods by fire, where plaintiff had no knowledge of such breach as would cast upon him the duty of procuring insurance coverage. *Danko v. Lewy*, 149 F.2d 66 (5th Cir. 1945).

Where contract by warehouseman to procure fire insurance was verbal, warehouse receipt did not measure the contract, especially where the receipt did not correctly list the goods stored. *Danko v. Lewy*, 149 F.2d 66 (5th Cir. 1945).

10. Degree of care.

Warehouseman storing cotton had duty of exercising proper care to prevent spread of fire after it had originated. *Jordan v. Federal Compress & Whse. Co.*, 156 Miss. 514, 126 So. 31 (1930).

Negligence of warehouseman must be based on things which should arouse attention of reasonably prudent person in care of his goods. *Oktibbeha County Cotton Whse. Co. v. J.C. Page & Co.*, 151 Miss. 295, 117 So. 834 (1928).

The receiver appointed at the instance of an insurer of cotton damaged by a flood while stored in a warehouse is liable to the holder of a warehouse receipt only for the value of the cotton in damaged condition, in the absence of evidence showing that damage or injury could have been avoided by the exercise of such care as a reasonably careful owner would exercise. *O.B. Crittenden & Co. v. North British & Mercantile Ins. Co. of London, Eng.*, 31 F.2d 700 (5th Cir. 1929).

11. Burden of proof.

When a bailor shows that goods are delivered to his bailee and are lost or destroyed, a prima facie presumption of negligence arises from which the bailee must absolve himself. *Smith v. Farmers Ginning Ass'n*, 201 Miss. 573, 29 So. 2d 663 (1947).

Warehouseman has burden of showing lawful excuse for failure to deliver cotton stored and must prove that loss by fire was not due to his negligence. *Federal Compress & Whse. Co. v. Coleman*, 143 Miss. 620, 109 So. 20 (1926).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Tort liability of warehousemen for theft by servant. 15 A.L.R.2d 829.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of perishable nature. 32 A.L.R.2d 910.

Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller. 54 A.L.R.2d 1361.

Validity of contractual provision limiting place or court in which action may be brought. 56 A.L.R.2d 300.

Warehouseman's liability for injury to stored goods from floods, heavy rains, etc. 60 A.L.R.2d 1097.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures. 92 A.L.R.2d 1298.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 84 et seq., 139 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:91-7:93, 7:101-7:105 (duty of care; contractual limitation of liability).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2631 et seq. (duty of care; contractual limitation of warehouseman's liability).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 56 et seq.

§ 75-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

SOURCES: Codes, 1942, § 41A:7-205; Laws, 1966, ch. 316, § 7-205, eff March 31, 1968.

Cross References — Good faith purchase of goods, see § 75-2-403.

Protection of buyer of goods from security interest created by seller, see § 75-9-320.

JUDICIAL DECISIONS**1. In general.**

In action against bank which took possession of elevator company for purpose of liquidation, buyer of beans sold by elevator company was not entitled under UCC §§ 7-205 and 7-207 to pro rata distribution with growers of beans that were in elevator, where buyer's claim was based

on drafts that buyer issued and which were marked non-negotiable, the beans were never delivered to buyer, and beans were delivered by bank to growers who were the true owners of the beans. *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses § 50.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:111 (instruction to jury; fungible goods purchased from ware-

houseman-dealer taken free and clear of any claim under a document of title).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 14, 15.

§ 75-7-206. Termination of storage at warehouseman's option.

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty (30) days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (Section 7-210) [§ 75-7-210].

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one (1) week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

(4) The warehouseman must deliver the goods to any person entitled to them under this chapter upon due demand made at any time prior to sale or other disposition under this section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

SOURCES: Codes, 1942, § 41A:7-206; Laws, 1966, ch. 316, § 7-206, eff March 31, 1968.

Cross References — Judicial process with respect to perishable commodities, see §§ 11-1-43 et seq.

Judicial sale of perishable goods, see § 13-3-167.

Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

Duty of bailee to deliver goods, see § 75-7-403.

Liens, generally, see §§ 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where storage company and owner of goods orally agreed that company would store goods in company's warehouse, that goods would remain there until shipment to specified destination within one year from date on which contract was made, and that storage charges would accrue until goods were shipped and then be paid along with shipment charges, and where company after storing goods for six months sold them for one dollar more than accrued charges thereon, company did not have right under UCC § 7-206(1) to terminate such storage unilaterally and sell goods. *American Transf. & Storage Co. v. Reichley*, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978) (overruling storage company's contention that it was entitled to instructed verdict simply because it had complied with UCC § 7-210 in selling the goods).

UCC § 7-206 does not mean that a warehouseman can terminate the storage of goods at his option, regardless of the agreement of the parties, if there is no document that sets out the period of storage. The language of UCC § 7-206 assumes that a document has been executed, and the statute does not address the situation in which the agreement is entirely oral. *American Transf. & Storage Co. v. Reichley*, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978).

Fifteen days notice of termination of warehouse bailment is insufficient as a matter of law under UCC § 7-206(1) providing for 30 days' notice. *Atkinson v. Port of Seattle*, 6 Wash. App. 693, 495 P.2d 686 (1972), review denied, 81 Wash. 2d 1001 (1972).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 136, 137.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:121, 7:122, 7:131, 7:141, 7:151, 7:161(termination of storage at warehouseman's option).

19 Am. Jur. Legal Forms 2d, Uniform

Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2651 et seq. (termination of storage at warehouseman's option).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 11, 12.

§ 75-7-207. Goods must be kept separate; fungible goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

SOURCES: Codes, 1942, § 41A:7-207; Laws, 1966, ch. 316, § 7-207, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

In action against bank which took possession of elevator company for purpose of liquidation, buyer of beans sold by elevator company was not entitled under UCC §§ 7-205 and 7-207 to pro rata distribution with growers of beans that were in elevator, where buyer's claim was based on drafts that buyer issued and which were marked non-negotiable, the beans were never delivered to buyer, and beans were delivered by bank to growers who were the true owners of the beans. *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976).

Subdivision 2 of this section changes in

some situations the prior law by giving to certain holders of "overissued" receipts for a portion of a fungible mass, the rights of a holder who has made a delivery of existing goods to a warehouseman but by its own terms this provision benefits only those holders to whom overissued receipts have been duly negotiated. *National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp.*, 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, *Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

RESEARCH REFERENCES

ALR. Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 26, 107 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:171 (termination of storage at warehouseman's option; separation of stored goods).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse

Receipts, Bills of Lading and Other Documents of Title, §§ 253:2661, 253:2662 (goods must be kept separate; fungible goods).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 11-15.

§ 75-7-208. Altered warehouse receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

SOURCES: Codes, 1942, § 41A:7-208; Laws, 1966, ch. 316, § 7-208, eff March 31, 1968.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments §§ 3 et seq.

78 Am. Jur. 2d, Warehouses § 34.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:181 7:182 (alteration of receipts).

12 Am. Jur. Legal Forms 2d, Liens § 165:32 (notice of sale to satisfy lien-warehousemen's lien).

20 Am. Jur. Legal Forms 2d, Warehouses §§ 258:107, 258:109 (lien of warehouseman).

1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proving fact of alteration).

CJS. 3A C.J.S., Alteration of Instruments §§ 7 et seq.

93 C.J.S., Warehousemen and Safe Depositaries §§ 41-49.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-7-209. Lien of warehouseman.

(1) A warehouseman has a lien against a bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest.

Such a security interest is governed by the chapter on Secured Transactions (Chapter 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503 [§ 75-7-503].

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

SOURCES: Codes, 1942, § 41A:7-209; Laws, 1966, ch. 316, § 7-209, eff March 31, 1968.

Cross References — Seller's tender of delivery of goods in possession of bailee, see § 75-2-503.

Duty of bailee to deliver goods, see § 75-7-403.

Document of title as conferring no rights against person having prior security interest, see § 75-7-503.

Priority of certain liens arising by operation of law, see § 75-9-333.

Liens, generally, see §§ 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Constitutional questions; due process.
3. Attachment of lien.
4. —Loss of lien.
5. —Nonattachment of lien.
6. Liability for fees and costs.
7. Priority.
8. Miscellaneous.

1. In general.

In deciding whether party was warehouseman so as to avail himself of lien under UCC § 7-209, among the factors to be considered are whether bailor has leased buildings; the duration of the lease; whether bailor pays rent to purported warehouseman; whether bailor exercises actual control over the chattels located in the building; and whether bailor stores property belonging to others in the building. *Surks v. Kenmare Storage & Moving Co.*, 38 A.D.2d 944 (2d Dep't 1972).

2. Constitutional questions; due process.

UCC § 7-209, granting warehousemen lien on goods stored or transported, for fees allegedly owed by customer, and UCC § 7-210, giving warehousemen authority to enforce such lien by public or private

sale upon proper notification to customer and adherence to commercially reasonable sale procedures, do not involve state action and, hence, do not violate due process clause of Fourteenth Amendment. *Flagg Bros. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

In action under 42 USCS § 1983 in which evicted tenant sought judgment declaring Wisconsin UCC § 7-210, permitting enforcement of warehouseman's lien, unconstitutional on due process grounds, where evidence showed that trial court had granted judgment of eviction, ordered restitution of premises to landlord, and issued writ of restitution, that sheriff had executed writ by removing plaintiff's goods from premises and contracting for services of mover to aid in such removal, and that mover had acquired warehouseman's lien under Wisconsin UCC § 7-209 for storage of plaintiff's goods and right under Wisconsin UCC § 7-210 to sell goods to enforce lien, (1) since writ of restitution issued only after judicial determination that landlord was entitled to possession of premises, plaintiff had had opportunity at a due process hearing to challenge creation of lien prior to writ's

issuance and due process did not require second hearing on matter before writ issued; (2) imposition by mover of charges for its services was implicitly authorized by the writ of restitution, and creation of mover's lien without regard to amount thereof was appropriate; and (3) due process did not require that plaintiff be given another hearing to challenge amount of mover's lien before mover could enforce lien under Wisconsin UCC § 7-210. *Wegwart v. Eagle Movers, Inc.*, 441 F. Supp. 872 (E.D. Wis. 1977), motion denied, 467 F. Supp. 573 (E.D. Wis. 1979) (construing Wisconsin law).

It was premature to grant evicted tenant's motion for summary judgment that UCC §§ 7-209 and 7-210 deprived tenant of her property without due process of law where favorable judgment on tenant's cause of action to recover possession of chattels from storage company would have obviated constitutional issue. *Jones v. Banner Moving & Storage, Inc.*, 48 A.D.2d 928 (2d Dep't 1975).

3. Attachment of lien.

Fact question was raised as to whether A properly obtained a lien upon the chattels of B through the issuance of warehouse receipts where there was a departure from the usual procedure in that the warehouseman has allegedly been given control of the building in which the chattels are stored and has not removed them to his own warehouse. *Surks v. Kenmare Storage & Moving Co.*, 38 A.D.2d 944 (2d Dep't 1972).

When goods once removed from a warehouse are subsequently redelivered to it, the warehouseman's lien reattaches to the property and it may retain possession thereof until its storage charges have been paid. *St. Germain v. Advance Fireproof Storage Whse. Corp.*, 44 Misc. 2d 719 (1964).

4. —Loss of lien.

In action by bean growers association for declaratory judgment concerning defendant public warehouseman's refusal to redeliver Great Northern beans stored in defendant's warehouse, although defendant lost its lien under UCC § 7-209(4) by wrongfully demanding that plaintiff pay unjustifiable charge for processing beans,

loss of such lien did not deprive defendant of right to set off charges for storage, insurance, and receiving in and loading out against amount due plaintiff as damages for defendant's conversion of beans, since warehouseman's right to compensation survives loss of warehouseman's lien. *Associated Bean Growers v. Chester B. Brown Co.*, 198 Neb. 775, 255 N.W.2d 425 (1977).

5. —Nonattachment of lien.

Where lessor of furnished house did not consent to storage of furniture by lessee, did not misrepresent ownership in any way other than giving lessee possession of furniture and did not acquiesce in lessee's procurement of warehouse receipt, storage company was not entitled to warehouseman's lien for unpaid storage charges under UCC § 7-209 and lessor was entitled to recover furniture or its value from storage company. *Disch v. Raven Transf. & Storage Co.*, 17 Wash. App. 73, 561 P.2d 1097 (1977).

Operator of garage and body shop, who at request of police officer towed plaintiff's automobile from scene of accident and refused to deliver vehicle to plaintiff unless towing and storage charges were paid, had no warehouseman's lien for such charges under UCC § 7-209(1), since mere garage keeper is not warehouseman within meaning of UCC § 7-102(1)(h). *Candler v. Ash*, 53 Ohio App. 2d 134, 372 N.E.2d 617 (1976) (noting, in holding operator liable for conversion of plaintiff's vehicle, that operator had not issued any warehouse receipt for vehicle).

6. Liability for fees and costs.

In action by bean growers association for declaratory judgment concerning defendant public warehouseman's refusal to redeliver Great Northern beans stored in defendant's warehouse, although defendant lost its lien under UCC § 7-209(4) by wrongfully demanding that plaintiff pay unjustifiable charge for processing beans, loss of such lien did not deprive defendant of right to set off charges for storage, insurance, and receiving in and loading out against amount due plaintiff as damages for defendant's conversion of beans, since warehouseman's right to compensation survives loss of warehouseman's lien.

Associated Bean Growers v. Chester B. Brown Co., 198 Neb. 775, 255 N.W.2d 425 (1977).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, under UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. *Nikolas v. Patrick*, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Public warehousemen, who commenced separate interpleader actions to determine the ownership of sturgeon and caviar stored with them, after conflicting claims of ownership had been asserted by several defendants, had no lien under this section for attorneys' fees, which were not the usual charges arising out of a storage transaction. *National Cold Storage Co. v. Tiya Caviar Co.*, 52 Misc. 2d 289 (1966).

Where the judgment in an interpleader action brought by a warehouseman is that a party to whom the plaintiff has delivered certain chattels should return them to the plaintiff since they belong to the other claimant, plaintiff may retain possession thereof under the lien granted by this section until the claimant found to be entitled thereto has paid the amount determined to be due the plaintiff, plus interest, costs, and disbursements, and the storage charges which may accrue on such chattels subsequently to the date of redelivery thereof to the warehouse and until

such claimant has paid judgment and such charges. *St. Germain v. Advance Fireproof Storage Whse. Corp.*, 44 Misc. 2d 719 (1964).

7. Priority.

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent authority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. *K Furn. Co. v. Sanders Transf. & Storage Co.*, 532 S.W.2d 910 (Tenn. 1975).

8. Miscellaneous.

Where the judgment in an interpleader action brought by a warehouseman is that a party to whom the plaintiff has delivered certain chattels should return them to the plaintiff since they belong to the other claimant, plaintiff may retain possession thereof under the lien granted by this section until the claimant found to be entitled thereto has paid the amount determined to be due the plaintiff, plus interest, costs, and disbursements, and the storage charges which may accrue on such chattels subsequently to the date of redelivery thereof to the warehouse and until such claimant has paid judgment and such charges. *St. Germain v. Advance Fireproof Storage Whse. Corp.*, 44 Misc. 2d 719 (1964).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 67, 68.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:191-7:193 (lien of warehouseman).

12 Am. Jur. Legal Forms 2d, Liens § 165:32 (notice of sale to satisfy lien — warehousemen's lien).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Docu-

ments of Title, §§ 253:2671 et seq. (lien of warehousemen).

20 Am. Jur. Legal Forms 2d, Warehouses §§ 258:107, 258:109 (lien of warehouseman).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 106-114.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-7-210. Enforcement of warehouseman's lien.

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten (10) days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two (2) weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen (15) days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten (10) days before the sale in not less than six (6) conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must be sold, but must be retained by the warehouseman subject to the terms of the receipt and this chapter.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

SOURCES: Codes, 1942, § 41A:7-210; Laws, 1966, ch. 316, § 7-210, eff March 31, 1968.

Cross References — Disposition of goods in lawful enforcement of lien as excusing bailee's obligation to deliver, see § 75-7-403.

Liens, generally, see §§ 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general; constitutional questions.
2. —“Under color of state law”.
3. Public notice of sale.
4. Sale.

1. In general; constitutional questions.

In action under 42 USCS § 1983 in which evicted tenant sought judgment declaring Wisconsin UCC § 7-210, permitting enforcement of warehouseman's lien, unconstitutional on due process grounds, where evidence showed that trial court had granted judgment of eviction, ordered restitution of premises to landlord, and issued writ of restitution, that sheriff had executed writ by removing plaintiff's goods from premises and contracting for services of mover to aid in such removal, and that mover had acquired warehouseman's lien under Wisconsin UCC § 7-209 for storage of plaintiff's goods and right under Wisconsin UCC § 7-210 to sell goods to enforce lien, (1) since writ of restitution issued only after judicial deter-

mination that landlord was entitled to possession of premises, plaintiff had had opportunity at a due process hearing to challenge creation of lien prior to writ's issuance and due process did not require second hearing on matter before writ issued; (2) imposition by mover of charges for its services was implicitly authorized by the writ of restitution, and creation of mover's lien without regard to amount thereof was appropriate; and (3) due process did not require that plaintiff be given another hearing to challenge amount of mover's lien before mover could enforce lien under Wisconsin UCC § 7-210. *Wegwart v. Eagle Movers, Inc.*, 441 F. Supp. 872 (E.D. Wis. 1977), motion denied, 467 F. Supp. 573 (E.D. Wis. 1979) (construing Wisconsin law).

It was premature to grant evicted tenant's motion for summary judgment that UCC §§ 7-209 and 7-210 deprived tenant of her property without due process of law where favorable judgment on tenant's cause of action to recover possession of

chattels from storage company would have obviated constitutional issue. *Jones v. Banner Moving & Storage, Inc.*, 48 A.D.2d 928 (2d Dep't 1975).

In evicted tenant's action for recovery of chattels, any determination of constitutionality of UCC provisions dealing with retention and enforcement provisions of warehousemen's liens was premature, since resolution of constitutional issue could have been obviated by possession. *Jones v. Banner Moving & Storage, Inc.*, 48 A.D.2d 928 (2d Dep't 1975).

Where possession of certain goods has been surrendered to a warehouseman, even though allegedly surrendered by a debtor who claimed to have been forced to sign a blank contract, the statute permitting warehousemen to execute a lien on such goods without prior determination by the courts as to the validity of the lien does not deprive the person surrendering such goods of due process of law. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972).

Code provision for enforcement of warehouseman's lien was not unconstitutional on ground that it permitted warehouseman to execute on statutory lien without prior determination by court of amount of lien. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972).

Where possession of goods had been voluntarily surrendered to warehouseman, UCC § 7-210 was not violative of constitutional due process in permitting sale of bailed goods without prior judicial hearing, since goods voluntarily surrendered were not such that deprivation thereof would drive debtor "to the wall", even where debtor claimed that he signed contract with warehouseman in blank and while under duress. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064

(2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972) (applying New York law).

2. —"Under color of state law".

Sale by warehouseman of personal property of plaintiffs under UCC § 7-210 for nonpayment of storage charges did not constitute "state action" for purposes of claim that such sale violated plaintiffs' rights under due process and equal protection clauses of Fourteenth Amendment, and plaintiffs were not entitled to relief under 42 USCA § 1983 (which authorizes civil action for deprivation, by one acting under color of state statute, of right secured by constitution), since (1) UCC § 7-210 does not delegate exclusive prerogative of the sovereign to a warehouseman, and (2) warehouseman's sale under UCC § 7-210 is not attributable to state on ground that state authorized and encouraged such sale by enacting UCC § 7-210. *Flagg Bros. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

A warehouseman's sale of individuals' stored goods for their nonpayment of storage charges, which sale is authorized by CLS, UCC § 7-210 governing the enforcement of a warehouseman's lien, does not constitute "state action" for purposes of the claim that the sale violates the Fourteenth Amendment's due process and equal protection clauses—the individuals thus failing to state a claim for relief under 42 USCA § 1983, which authorizes a civil action for deprivation, by a person acting under color of a state statute, of a right "secured by the Constitution"—since the law does not delegate to a warehouseman an exclusive prerogative of the sovereign, and a warehouseman's sale under the law cannot be attributed to the state on the ground that the state authorized and encouraged such sales by enacting the law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

UCC § 7-209, granting warehousemen lien on goods stored or transported, for fees allegedly owed by customer, and UCC § 7-210, giving warehousemen authority to enforce such lien by public or private sale upon proper notification to customer

and adherence to commercially reasonable sale procedures, do not involve state action and, hence, do not violate due process clause of Fourteenth Amendment. *Flagg Bros. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

Sale by warehouseman under UCC § 7-210 of bakery equipment belonging to plaintiff corporation was act done under color of state law within meaning of 42 USCA § 1983 (authorizing civil action for deprivation, by one acting under color of state statute, of rights secured by constitution); and such sale, which deprived plaintiff of its property without hearing, violated due process clause of Fourteenth Amendment where (1) issue of deprivation was at all times in sole hands of warehouseman, who decided that all charges against property sold were just, that each charge was legally secured by his warehouseman's lien, that sale would be made by auction, and that he would appoint auctioneer; and (2) there was no supervision of such sale by any state or local officials and no opportunity for plaintiff to post bond. *Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356 (8th Cir. N.D. 1977).

Action of warehousemen in selling stored items under UCC § 7-210 without prior hearing was private action and not action "under color of state law," giving rise to Civil Rights Act action, where, inter alia, storage contract entered into between customers and warehousemen specified that warehousemen should have general lien on all stored property with right to sell property on default. *Smith v. Bekins Moving & Storage Co.*, 384 F. Supp. 1261 (E.D. Pa. 1974).

3. Public notice of sale.

Warehouseman was liable for sale of plaintiff's property in violation of UCC

§ 7-210(1) and (2)(f), and plaintiff as matter of law was entitled to damages based on agreed value of property per pound, as permitted by UCC § 7-204(2). However, plaintiff was not entitled to recover damages for conversion and punitive damages where evidence showed without dispute that erroneous date of sale contained in newspaper notice was result of clerical error not wilfully caused by warehouseman within meaning of UCC 7-210(9). *Long's Transf. & Storage v. Busby*, 358 So. 2d 393 (Miss. 1978).

Requirement that warehouseman advertise sale of goods sold to satisfy its lien was applicable to carrier. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478 (6th Cir. Ohio 1973).

4. Sale.

Where storage company and owner of goods orally agreed that company would store goods in company's warehouse, that goods would remain there until shipment to specified destination within one year from date on which contract was made, and that storage charges would accrue until goods were shipped and then be paid along with shipment charges, and where company after storing goods for six months sold them for one dollar more than accrued charges thereon, company did not have right under UCC § 7-206(1) to terminate such storage unilaterally and sell goods. *American Transf. & Storage Co. v. Reichley*, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978) (overruling storage company's contention that it was entitled to instructed verdict simply because it had complied with UCC § 7-210 in selling the goods).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 74 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:201-7:203 (lien of warehouseman; enforcement).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse

Receipts, Bills of Lading and Other Documents of Title, §§ 253:2681 et seq. (enforcement of warehouseman's lien).

13 Am Jur, Carriers § 533.

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 113, 114.

PART 3.

BILLS OF LADING: SPECIAL PROVISIONS.

SEC.

- 75-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.
- 75-7-302. Through bills of lading and similar documents.
- 75-7-303. Diversion; reconsignment; change of instructions.
- 75-7-304. Bills of lading in a set.
- 75-7-305. Destination bills.
- 75-7-306. Altered bills of lading.
- 75-7-307. Lien of carrier.
- 75-7-308. Enforcement of carrier's lien.
- 75-7-309. Duty of care; contractual limitation of carrier's liability.

§ 75-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

(1) A consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load and count" or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such

particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

SOURCES: Codes, 1942, § 41A:7-301; Laws, 1966, ch. 316, § 7-301, eff March 31, 1968.

Cross References — Liability of issuer of warehouse receipt for nonreceipt or misdescription of goods, see § 75-7-203.

Care required of carrier issuing bill of lading, see § 75-7-309.

Issuer's liability for damages caused by overissue or failure to identify duplicate document as such, see § 75-7-402.

Obligation of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

JUDICIAL DECISIONS

1. In general.

Bill of lading did not incorporate terms of time charter, and thus did not incorporate arbitration clause of charter, where blanks on bill of lading incorporation provision were not filled in. *CIA. Platamon de Navegacion, S.A. v. Empresa Colombiana de Petroleos*, 478 F. Supp. 66 (S.D.N.Y. 1979).

If no bill of lading is issued for interstate shipment, the terms of the Uniform Bill of Lading control. *Norca Corp. v. Pilot Freight Carriers, Inc.*, 63 Misc. 2d 684 (1970).

Where evidence establishes that dam-

age to goods being shipped was direct result of improper loading, "shipper's weight, load and count" bill of lading shall operate as complete defense for carrier as to such damage. *D.H. Overmyer Co. v. Nelson-Brantley Glass Co.*, 119 Ga. App. 599, 168 S.E.2d 176 (1969).

A plaintiff, who occupied the position of an assignee, transferee, or pledgee of non-negotiable straight bills of lading, was not a "consignee", the only party protected by UCC § 7-301 and could not successfully sue on two intrastate bills issued for non-existent goods. *G.A.C. Com. Corp. v. Wilson*, 271 F. Supp. 242 (S.D.N.Y. 1967).

RESEARCH REFERENCES

ALR. Carrier's issuance of bill of lading, or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received. 33 A.L.R.2d 867.

Rail or motor freight carrier's liability for loss through weight deficiency of goods shipped. 39 A.L.R.2d 325.

Liability of carrier by land or air for damage to goods shipped resulting from improper loading. 44 A.L.R.2d 993.

Conclusiveness of receipt clauses in bill of lading. 67 A.L.R.2d 1028.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 341 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:211 et seq. (liability for misdating, nonreceipt, or misdescription).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2701 et seq. (liability for nonreceipt or misdescription; "said to contain;" "shipper's load and count;" improper handling).

CJS. 13 C.J.S., Carriers §§ 390, 391, 393, 394.

80 C.J.S., Shipping §§ 260-265.

§ 75-7-302. Through bills of lading and similar documents.

(1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

SOURCES: Codes, 1942, § 41A:7-302; Laws, 1966, ch. 316, § 7-302, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

Air carrier that issued bill of lading to shipper was liable to shipper for loss of gold coins which occurred while coins were in possession of connecting air carrier and connecting air carrier in turn, was liable to originating air carrier, notwithstanding claim of connecting air carrier that shipper and/or originating air carrier failed to comply with applicable

tariffs with regard to shipment in that advance arrangements had not been made for shipment of extraordinary value, since there was no showing that shipper's or originating air carrier's acts had any causal connection with loss of coins. *Braniff Airways Inc. v. El Paso Coin Co.*, 517 S.W.2d 915 (Tex. Civ. App. 1974), ref. n.r.e., cert. denied, 423 U.S. 1032, 96 S. Ct. 563, 46 L. Ed. 2d 405 (1975).

RESEARCH REFERENCES

Am Jur. 13 *Am. Jur.* 2d, Carriers §§ 438-441, 511, 518.

6 *Am. Jur. Pl & Pr Forms* (Rev), Warehouse Receipts, Forms 7:251-7:253

(through bills and similar documents).

19 *Am. Jur. Legal Forms* 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Docu-

ments of Title, §§ 253:2711 et seq. (through bills of lading and similar documents).

CJS. 13 C.J.S., Carriers § 394.
80 C.J.S., Shipping §§ 260-265.

§ 75-7-303. Diversion; reconsignment; change of instructions.

(1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from

(a) the holder of a negotiable bill; or

(b) the consignor on a nonnegotiable bill notwithstanding contrary instruction from the consignee; or

(c) the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or

(d) the consignee on a nonnegotiable bill if he is entitled as against the consignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

SOURCES: Codes, 1942, § 41A:7-303; Laws, 1966, ch. 316, § 7-303, eff March 31, 1968.

Cross References — Duty of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

Effect of consignor's diversion or change of shipping instructions, see § 75-7-504(3).

JUDICIAL DECISIONS

1. In general.

Where seller sold two carloads of fertilizer to buyer, received two checks in payment therefore, and shipped goods by railroad under straight, nonnegotiable bills of lading, where buyer resold goods to plaintiff, and where, after bank notified seller there were insufficient funds to cover buyer's checks, seller issued reconsignment order to railroad instructing it to deliver goods to another consignee, neither seller nor railroad was liable to plaintiff for cost of goods: (1) under UCC § 2-703, upon failure of checks presented by buyer to seller, seller was lawfully entitled to pos-

session of goods; (2) under UCC 7-303, since bills of lading were nonnegotiable, railroad was obligated to deliver goods pursuant to instructions of seller, as consignor. *Clock v. Missouri-Kan.-Tex. R.R.*, 407 F. Supp. 448 (E.D. Mo. 1976), aff'd, 553 F.2d 102 (8th Cir. Mo. 1977) (applying Missouri law).

The consignee or other holder of a negotiable bill of lading is ordinarily the only person entitled to authorize a diversion or modification of the delivery terms. *Koreska v. United Cargo Corp.*, 23 A.D.2d 37 (1st Dep't 1965).

RESEARCH REFERENCES

ALR. Liability for damages from loss of shipper's opportunity to sell or divert goods at intermediate point because of carrier's deviation from route. 33 A.L.R.2d 145.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 438-441.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:252 (through bills and similar documents; defense of no con-

version, by virtue of seller's agent authorizing carrier to surrender goods without receiving bill of lading).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:261, 7:262 (diver-

sion; reconsignment; change of instructions).

CJS. 13 C.J.S., Carriers §§ 408, 410, 411.

80 C.J.S., Shipping §§ 268 et seq.

§ 75-7-304. Bills of lading in a set.

(1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one (1) bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with Part 4 of this chapter against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

SOURCES: Codes, 1942, § 41A:7-304; Laws, 1966, ch. 316, § 7-304, eff March 31, 1968.

Cross References — Rights under document of title purporting to cover goods already represented by outstanding document, see § 75-7-402.

Bailee's obligation to deliver, see § 75-7-403.

Negotiation of documents of title, see § 75-7-501.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 327, 371.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:271, 7:272 (bills in a set).

CJS. 13 C.J.S., Carriers §§ 390, 391, 393, 394.

80 C.J.S., Shipping §§ 268 et seq.

§ 75-7-305. Destination bills.

(1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

(2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

SOURCES: Codes, 1942, § 41A:7-305; Laws, 1966, ch. 316, § 7-305, eff March 31, 1968.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers, §§ 324, 325, 331. **CJS.** 13 C.J.S., Carriers §§ 390-393.

§ 75-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

SOURCES: Codes, 1942, § 41A:7-306; Laws, 1966, ch. 316, § 7-306, eff March 31, 1968.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments §§ 1 et seq.
 13 Am. Jur. 2d, Carriers §§ 329, 330.
 6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:281-7:283 (altered bills of lading).
 1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proving fact of alteration).
CJS. 3A C.J.S., Alteration of Instruments §§ 7 et seq.
 13 C.J.S., Carriers § 395.

§ 75-7-307. Lien of carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

SOURCES: Codes, 1942, § 41A:7-307; Laws, 1966, ch. 316, § 7-307, eff March 31, 1968.

Cross References — Warehousemen's lien, see § 75-7-209.

Application of statute governing secured transactions to security interests created by lien, see § 75-9-102(2).

Perfection of security interests in goods covered by documents, see § 75-9-312.

Liens, generally, see §§ 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

With respect to two automobiles in possession of towing companies that refused to surrender possession of them until towing and storage charges were paid, one automobile having been towed from scene of accident at direction of police and other automobile having been removed from private property at direction of property owner, towing companies were not entitled to lien for towing and storage charges under UCC § 7-307 since automobiles were not covered by bill of lading as required by § 7-307(1). In any case, towing companies were not entitled to assert liens against automobile owners under § 7-307(2) since neither vehicle was alleged to have been towed because towing companies were required to do so

by law, or at the instruction of a bailor who was permitted to exercise control over automobiles. *Younger v. Plunkett*, 395 F. Supp. 702 (E.D. Pa. 1975) (applying Pennsylvania law).

Lien on leased sidings was lost when they were voluntarily delivered; held, sale to satisfy alleged lien would amount to conversion. *Darby v. B & O R.R.*, 259 Md. 493, 270 A.2d 652 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state statute giving carrier lien on goods for transportation and incidental storage charges. 45 A.L.R.5th 227.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 527, et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:291, 7:292 (lien of carrier).

CJS. 13 C.J.S., Carriers §§ 475-480, 484, 485.

80 C.J.S., Shipping §§ 377, 378.

§ 75-7-308. Enforcement of carrier's lien.

(1) A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold,

but must be retained by the carrier subject to the terms of the bill and this chapter.

(3) The carrier may buy at any public sale pursuant to this section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.

(5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either subsection (1) or the procedure set forth in subsection (2) of Section 7-210 [§ 75-7-210(1) or (2)].

(8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

SOURCES: Codes, 1942, § 41A:7-308; Laws, 1966, ch. 316, § 7-308, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

In trover action brought by express company against purchasers of goods sold by another carrier at public sale to enforce carrier's lien, under UCC § 7-308(4) pur-

chasers, who were in good faith as defined by UCC § 1-201(19), took goods free of any claim of plaintiff express company. *REA Express, Inc. v. Ginn*, 131 Ga. App. 33, 205 S.E.2d 94 (1974).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state statute giving carrier lien on goods for transportation and incidental storage charges. 45 A.L.R.5th 227.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 380, 472, 533.

18 Am. Jur. 2d, Conversion § 20.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:301-7:303.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2721 et seq. (enforcement of carrier's lien).

CJS. 13 C.J.S., Carriers § 485.

80 C.J.S., Shipping §§ 377, 378.

§ 75-7-309. Duty of care; contractual limitation of carrier's liability.

(1) A carrier who issues a bill of lading whether negotiable or nonnegotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

SOURCES: Codes, 1942, § 41A:7-309; Laws, 1966, ch. 316, § 7-309, eff March 31, 1968.

Cross References — Application of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Liability of issuer of bill of lading for nonreceipt or misdescription, see § 75-7-301.

Obligation of bailee to delivery goods to person entitled under document, see § 75-7-403.

Absence of liability for good faith delivery of goods according to terms of document of title, etc., see § 75-7-404.

JUDICIAL DECISIONS

1. In general.
2. —Claim.
3. —Within 9 months.
4. Limitation of liability.
5. —Opportunity to declare higher value.
6. Practice and procedure.

1. In general.

Where neither the goods in question nor the bill of lading pertaining thereto were delivered by the carrier to the consignee, the provisions of the Uniform Commercial Code did not apply where the consignee claimed the loss of the goods. *Wells & Coverly, Inc. v. Red Star Express Lines of Auburn, Inc.*, 62 Misc. 2d 269 (1969).

2. —Claim.

In order to constitute a claim, the carrier should be advised that a loss occurred, the nature of the loss, the nature of the shipment involved, the approximate date of shipment, its point of origin and destination, and that the parties to the shipment expect restitution or reimbursement. *Norca Corp. v. Pilot Freight Carriers, Inc.*, 63 Misc. 2d 684 (1970).

In order for a claim to comply with the provisions of Uniform Bill of Lading, the

shipper must, in writing, convey the information that a demand for damages is being made or will be made. *Interchemie, Ltd. v. Eastern Express, Inc.*, 62 Misc. 2d 850 (1970).

3. —Within 9 months.

Nine-month notice of claim requirement was "reasonable provision" within meaning of Code § 7-309(3). *Sydnor & Hundley, Inc. v. Wilson Trucking Corp.*, 213 Va. 704, 194 S.E.2d 733 (1973).

Where there was no bill of lading provision providing otherwise, as part of the contract of carriage and as a condition precedent to recovery for failure to deliver goods, claims must be filed in writing within nine months, and an action thereon must be instituted within two years. *Norca Corp. v. Pilot Freight Carriers, Inc.*, 63 Misc. 2d 684 (1970).

The consignee was not bound by the terms of a bill of lading between the shipper and the motor carrier providing that claims must be filed with the carrier within nine months after the loss. *Wells & Coverly, Inc. v. Red Star Express Lines of Auburn, Inc.*, 62 Misc. 2d 269 (1969).

4. Limitation of liability.

Warehouseman and common carriers may limit liability to stated value of property. *Allright, Inc. v. Elledge*, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Under UCC §§ 7-204(2) and 7-309(2) warehouseman and common carriers may limit liability to stated value of property. *Allright, Inc. v. Elledge*, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Fact that contract between shipper and time charterer stated that it was to be governed by New York law, and UCC § 7-309(2), as adopted in New York, allowed carrier to limit liability to value stated in bill of lading only when carrier's rates were dependent on value, did not affect time charterer's entitlement to damage limitation contained in Carriage of Goods by Sea Act in light of UCC § 7-103 making UCC subject to any treaty or statute of the United States. *Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser*, 507 F.2d 68 (2d Cir. N.Y. 1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975) (involving New York law).

Employee of common carrier is entitled to benefit of limitation of liability of carrier for negligence. *Howard v. Finnegan's Whse. Corp.*, 33 A.D.2d 1090 (3d Dep't 1970).

5. —Opportunity to declare higher value.

Under UCC § 7-309(2), where a tariff has been filed, it is the tariff that must afford the shipper an opportunity to declare a higher value on the goods shipped. Only where no tariff has been filed does the carrier have a duty to inform the shipper by some other means of the opportunity to declare a higher value on the goods. *Elizabeth-Perkins, Inc. v. Morgan Express, Inc.*, 554 S.W.2d 216 (Tex. Civ. App. 1977).

In consignee's suit against carrier to recover value of three dresses delivered to carrier for return shipment to plaintiff, where such dresses which were worth

\$600 were originally shipped by plaintiff to customer on approval and their true value was noted on waybill for such shipment, and where customer returned dresses to plaintiff but did not declare their true value on return shipment and waybill for such shipment limited shipper's liability to \$50 unless greater value was declared, (1) plaintiff as consignee of return shipment was entitled to recover from carrier; (2) carrier's liability was limited to \$50; and (3) carrier in order to rely on such limitation of liability was not required by UCC § 7-309(2) to prove that it had expressly called shipper's attention to waybill's liability-limitation provision, since carrier had filed tariff containing such provision with state railroad commission and carrier's rates under the tariff of shipments and distance shipped. *Elizabeth-Perkins, Inc. v. Morgan Express, Inc.*, 554 S.W.2d 216 (Tex. Civ. App. 1977).

6. Practice and procedure.

Breach of duty of due care imposed on carriers by UCC § 7-309(1) gave rise to action for breach of contract, but does not give rise to independent tort action, and UCC § 7-309(2) authorizing limitations of liability for carrier was not rendered inapplicable by failure to carrier to exercise duty of due care. *Gibson v. Greyhound Bus Lines*, 409 F. Supp. 321 (M.D. Fla. 1976), aff'd, 539 F.2d 708 (5th Cir. Fla. 1976).

In action by owners, consignees and shippers against marine terminal operator to recover value of goods destroyed by fire, one-year limitation for commencing suit contained in bills of lading was "reasonable" under UCC § 7-309(3) and was, therefore, valid; however, portion of clause in bills of lading providing that "suit shall not be deemed brought until jurisdiction has been obtained," establishing service of process as necessary to commencement of suit, would not be given effect and action against terminal operator was commenced with filing of complaint, not with service of process. *Lawrence R. McCoy Co. v. S.S. Theomitor III*, 133 N.J. Super. 308, 336 A.2d 80 (L. Div. 1975).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped. 25 A.L.R.2d 770.

Validity of contractual provision limiting place or court in which action may be brought. 56 A.L.R.2d 300.

Conclusiveness of receipt clauses in bill of lading. 67 A.L.R.2d 1028.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 332-327, 336 et seq.

14 Am. Jur. 2d, Carriers §§ 555 et seq., 537 et seq., 577 et seq.

18 Am. Jur. 2d, Conversion § 17.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:311-7:314 (duty of care; contractual limitation of carrier's liability).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2731 et seq. (duty of care; contractual limitation of carrier's liability).

CJS. 13 C.J.S., Carriers §§ 418, 419, 421.

80 C.J.S., Shipping §§ 276 et seq.

PART 4.

WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS.

SEC.

- 75-7-401. Irregularities in issue of receipt or bill or conduct of issuer.
- 75-7-402. Duplicate receipt or bill; overissue.
- 75-7-403. Obligation of warehouseman or carrier to deliver; excuse.
- 75-7-404. No liability for good faith delivery pursuant to receipt or bill.

§ 75-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this chapter on an issuer apply to a document of title regardless of the fact that

- (a) the document may not comply with the requirements of this chapter or of any other law or regulation regarding its issue, form or content; or
- (b) the issuer may have violated laws regulating the conduct of his business; or
- (c) the goods covered by the document were owned by the bailee at the time the document was issued; or
- (d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

SOURCES: Codes, 1942, § 41A:7-401; Laws, 1966, ch. 316, § 7-401; eff March 31, 1968.

Cross References — Application of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Liability of issuer of document of title for nonreceipt or misdescription of goods, see § 75-7-203.

Liability of warehouseman for damages for loss of or injury to goods, see § 75-7-204.

Liability of issuer of bill of lading for non-receipt or misdescription of goods, see § 75-7-301.

Care required of carrier issuing bill of lading, see § 75-7-309.

Obligation of bailee to deliver goods to person entitled under document, see § 75-7-403.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 324-327, 336 et seq.

78 Am. Jur. 2d, Warehouses §§ 27, 29.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:321-7:323 (irregularities in issue or in conduct of issuer).

CJS. 8 C.J.S., Bailments §§ 19 et seq.

13 C.J.S., Carriers §§ 390, 391, 393, 394.

80 C.J.S., Shipping §§ 260-265.

93 C.J.S., Warehousemen and Safe Depositaries §§ 27 et seq.

§ 75-7-402. Duplicate receipt or bill; overissue.

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

SOURCES: Codes, 1942, § 41A:7-402; Laws, 1966, ch. 316, § 7-402; eff March 31, 1968.

Cross References — Rights under overissued warehouse receipts for commingled fungible goods, see § 75-7-207(2).

Liability as to bill of lading drawn in set of parts, see § 75-7-304.

Rights conferred against person having interest prior to issuance of document of title, see § 75-7-503.

Court's order where document of title lost, stolen or destroyed, see § 75-7-601.

JUDICIAL DECISIONS

1. In general.

Where carrier, having issued two original bills of lading and having been informed that original bills had either been lost or destroyed, issued duplicate original set of bills of lading, carrier was obliged to deliver goods to party presenting them; duplicate original bills of lading served

same purpose as that of original bills of lading, i.e., to enable party holding document to present it and to obtain possession of goods. *Zervos v. S.S. Sam Houston*, 427 F. Supp. 500 (S.D.N.Y. 1976), aff'd, 636 F.2d 1202 (2d Cir. N.Y. 1980) (applying New York law).

RESEARCH REFERENCES

Am Jur. 13 *Am. Jur. 2d*, Carriers §§ 325-327, 329, 330, 369, 370, 462.

78 *Am. Jur. 2d*, Warehouses § 32.

6 *Am. Jur. Pl & Pr Forms (Rev)*, Warehouse Receipts, Forms 7:331, 7:332 (duplicate and overissued documents).

19 *Am. Jur. Legal Forms 2d*, Uniform Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Docu-

ments of Title, §§ 253:2741, 253:2742 (duplicate receipt of bill; overissue).

CJS. 8 *C.J.S.*, Bailments §§ 19 et seq.

13 *C.J.S.*, Carriers §§ 390, 391, 393, 394.

80 *C.J.S.*, Shipping §§ 260-265.

93 *C.J.S.*, Warehousemen and Safe Depositories §§ 27 et seq.

§ 75-7-403. Obligation of warehouseman or carrier to deliver; excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the chapter on Sales (Section 2-705) [§ 75-2-705];

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this chapter (Section 7-303) [§ 75-7-303] or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under Section 7-503(1) [§ 75-7-503(1)], he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

SOURCES: Codes, 1942, § 41A:7-403; Laws, 1966, ch. 316, § 7-403; eff March 31, 1968.

Cross References — Effect of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Warehouseman's liability for loss of or injury to goods, see § 75-7-204.

Duty and liability of carrier issuing bill of lading, see § 75-7-309.

Rights acquired on negotiation of document of title, see § 75-7-502.

Document of title to goods defeated in certain cases, see § 75-7-503.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.
2. Particular applications.
3. Practice and procedure.
4. —Burden of proof.

B. Pre-Uniform Commercial Code Decisions.

5. Decisions under Code 1942 § 5019.
6. Decisions under Code 1942 § 5020.
7. Decisions under Code 1942 § 5022.

A. Decisions Under Uniform Commercial Code.

1. In general.

Provisions relating to the obligation of the warehouseman to deliver under the Uniform Warehouse Receipts Act are now found in subdivision (1)(b) of the instant section. *D'Aloisio v. Morton's, Inc.*, 342 Mass. 231, 172 N.E.2d 819 (1961).

2. Particular applications.

In action by secured party against warehouseman for value of warehoused cattle, where nonnegotiable warehouse receipts provided that cattle were to be delivered for sale on written instructions of secured party, secured party by letter authorized warehouseman to deliver cattle for sale and also required confirmation of delivery by next business day, cattle were delivered to feed-lot operator and immediately released by operator to purchaser, warehouseman failed to give notice of delivery within time specified, and secured party never received proceeds of sale, (1) warehouseman's obligation to deliver cattle was governed by UCC § 7-403(1) and (4); (2) requirement in secured party's letter about confirming delivery of cattle by next business day was independent covenant and not condition subsequent to warehouseman's authority to release cattle; (3) although warehouseman did not misdeliver cattle, warehouseman's failure

to give secured party timely confirmation of delivery gave rise to liability for breach of contract; and (4) trial court should have granted warehouseman's request for instruction on question whether secured party's loss was caused by failure to give timely confirmation of delivery. *Utica Nat'l Bank & Trust Co. v. Happy Wheat Growers, Inc.*, 558 F.2d 279 (5th Cir. Tex. 1977) (applying Texas law).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, under UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. *Nikolas v. Patrick*, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Warehouse in which cotton was stored was, according to bailment contract, obligated to release cotton only upon presentation of negotiable warehouse receipt. *Citizens Co-op Gin v. United States*, 427 F.2d 692 (5th Cir. Tex. 1970).

The consignee or other holder of a negotiable bill of lading is ordinarily the only person entitled to authorize a diversion or modification of the delivery terms. *Koreska v. United Cargo Corp.*, 23 A.D.2d 37 (1st Dep't 1965).

3. Practice and procedure.

Wife was entitled to judgment as matter of law in conversion action against warehouseman, where warehouseman delivered household goods and other personal property to husband's father upon forged written authorization in wife's name, but without requiring production of non-negotiable warehouse receipt issued by warehouseman upon deposit of goods, and where it was expressly agreed in warehouse receipt, the contract between the

parties, that receipt had to be produced before delivery of goods to depositor or transfer of goods to another person. *Turner v. Scobey Moving & Storage Co.*, 515 S.W.2d 253 (Tex. 1974).

Where cargo was properly loaded in good condition, and where there was failure of carrier to explain certain facts in the record, owner of goods made a prima facie case of carrier liability; because carrier failed to prove safe delivery of goods to primary carrier, common-law rule limiting liability of connecting carriers cannot operate to rebut owner's prima facie case. *Marks Mfg. Co. v. New York Cent. R.R.*, 448 F.2d 68 (6th Cir. Mich. 1971).

4. —Burden of proof.

Section 7-403's rule placing burden on warehouseman to establish lawful excuse for refusal or failure to deliver goods on demand relied upon in decision establishing rule placing burden on bailee in all bailment for hire cases to prove that he exercised due care to prevent property's loss or destruction. *Knowles v. Gilchrist Co.*, 362 Mass. 642, 289 N.E.2d 879 (1972).

Bailor has burden of proving bailee's negligence which caused loss or damage to bailed goods. *Rosen v. Village Chevrolet, Inc.*, 63 Misc. 2d 174 (1970).

Under the provisions of this section the warehouseman has the burden of explanation for any loss or disappearance of the property bailed with him. *National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp.*, 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, *Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

B. Pre-Uniform Commercial Code Decisions.

5. Decisions under Code 1942 § 5019.

Warehouseman has burden of showing lawful excuse for failure to deliver cotton stored and must prove that loss by fire was not due to his negligence. *Federal Compress & Whse. Co. v. Coleman*, 143 Miss. 620, 109 So. 20 (1926).

6. Decisions under Code 1942 § 5020.

Persons who bought stolen compress cotton receipts in good faith, and sold

cotton represented to another, could not be held by compress for conversion of cotton. *Latimer v. Stubbs*, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

Where person bought stolen compress cotton receipts in good faith and sold cotton represented by them to another, who also acted in good faith, and compress delivered cotton to buyer, though receipts did not bear indorsement of company to which they had been issued, compress could not recover against person first buying receipts for conversion of cotton, particularly in absence of proof that cotton had been sold by one taking delivery. *Latimer v. Stubbs*, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

7. Decisions under Code 1942 § 5022.

The duty of a warehouseman under the statute to take up and cancel negotiable receipts upon the delivery of goods represented by such receipts is an absolute, non-delegable duty, for the nonperformance of which by his agent, the warehouseman is liable, even though the agent's default is negligent, wilful, or even criminal, as where he delivers goods, without cancelation of the receipt, in pursuance to a conspiracy between himself and the agent of a co-operative association which takes such receipts from its stockholders by way of pledge or purchase. *American Cotton Coop. Ass'n v. Union Compress & Whse. Co.*, 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

Under this statute the question as to whether failure to cancel warehouse receipts on delivery of the goods represented thereby is the proximate cause of a loss incurred by the transferee of the receipt is immaterial, in an action by the transferee against the warehouseman. *American Cotton Coop. Ass'n v. Union Compress & Whse. Co.*, 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

The fact that an agent of a transferee of warehouse receipts knows of, and participates in, a scheme by the warehouseman's agent to defraud the transferee by making deliveries of the goods without cancelation of the receipt, in violation of the statute, does not make the transferee chargeable with knowledge of the fact that the goods

were delivered without cancelation of the receipt. *American Cotton Coop. Ass'n v.*

Union Compress & Whse. Co., 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Shipper's ratification of carrier's unauthorized delivery or misdelivery. 15 A.L.R.2d 807.

Interest on damages for warehouseman's refusal to delivery property. 36 A.L.R.2d 337.

Am Jur. 8 Am. Jur. 2d, Bailments § 225.

13 Am. Jur. 2d, Carriers §§ 442 et seq., 459, 460, 463, 473, 478, 479.

15A Am. Jur. 2d, Commercial Code § 36.

78 Am. Jur. 2d, Warehouses §§ 122 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:341-7:343 (obligation of warehouseman or carrier to deliver; excuses).

CJS. 8 C.J.S., Bailments §§ 80-92, 97, 98.

13 C.J.S., Carriers §§ 394, 408, 410, 411.

80 C.J.S., Shipping §§ 268 et seq.

93 C.J.S., Warehousemen and Safe Depositaries §§ 80 et seq.

§ 75-7-404. No liability for good faith delivery pursuant to receipt or bill.

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this chapter is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

SOURCES: Codes, 1942, § 41A:7-404; Laws, 1966, ch. 316, § 7-405; eff March 31, 1968.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

Wife was entitled to judgment as matter of law in conversion action against warehouseman, where warehouseman deliv-

ered household goods and other personal property to husband's father upon forged written authorization in wife's name, but without requiring production of non-negotiable warehouse receipt issued by warehouseman upon deposit of goods, and where it was expressly agreed in warehouse receipt, the contract between the parties, that receipt had to be produced before delivery of goods to depositor or transfer of goods to another person. *Turner v. Scobey Moving & Storage Co.*, 515 S.W.2d 253 (Tex. 1974).

Section referred to as example of explicit requirement that party exercise

more than "honesty in fact." *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

B. Pre-Uniform Commercial Code Decisions.

2. In general.

Where person bought stolen compress cotton receipts in good faith and sold cotton represented by them to another, who also acted in good faith, and compress

delivered cotton to buyer, though receipts did not bear indorsement of company to which they had been issued, compress could not recover against person first buying receipts for conversion of cotton, particularly in absence of proof that cotton had been sold by one taking delivery. *Latimer v. Stubbs*, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 460, 474.

78 Am. Jur. 2d, Warehouses §§ 122, 123.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:351(effect of good

faith delivery pursuant to terms).

CJS. 8 C.J.S., Bailments §§ 86-96.

13 C.J.S., Carriers §§ 408, 410, 411.

80 C.J.S., Shipping §§ 260-265, 266 et seq.

93 C.J.S., Warehousemen and Depositories §§ 80 et seq.

PART 5.

WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

SEC.

- 75-7-501. Form of negotiation and requirements of "due negotiation".
- 75-7-502. Rights acquired by due negotiation.
- 75-7-503. Document of title to goods defeated in certain cases.
- 75-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.
- 75-7-505. Indorser not a guarantor for other parties.
- 75-7-506. Delivery without indorsement; right to compel indorsement.
- 75-7-507. Warranties on negotiation or transfer of receipt or bill.
- 75-7-508. Warranties of collecting bank as to documents.
- 75-7-509. Receipt or bill: when adequate compliance with commercial contract.

§ 75-7-501. Form of negotiation and requirements of "due negotiation".

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2)(a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is “duly negotiated” when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee’s rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

SOURCES: Codes, 1942, § 41A:7-501; Laws, 1966, ch. 316, § 7-501, eff March 31, 1968.

Cross References — Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

When title under warehouse receipt defeated, see § 75-7-205.

Rights acquired by holder on negotiation of document of title, see § 75-7-502.

Right in goods against person having interest before issuance of document of title, see § 75-7-503.

Endorsement as not imposing liability for default by bailee or previous endorsers, see § 75-7-505.

Right of transferee to require transferor to supply necessary endorsement, see § 75-7-506.

Warranties of transferor of document of title, see § 75-7-507.

Farm warehouse receipts, see § 75-43-11.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. Decisions under Code 1942 § 5048.
3. Decisions under Code 1942 § 5051.
4. Decisions under Code 1942 § 7780.

A. Decisions Under Uniform Commercial Code.

1. In general.

Warehouse receipts providing that on return thereof one bale of cotton would be delivered to “above named depositor or its order, or bearer” were negotiable as bearer documents of title under UCC

§ 7-104(1)(a), as against contention that if both “order” language and “bearer” language appeared on face of such instruments they would be nonnegotiable, and such receipts were “duly negotiated” to holders thereof within meaning of UCC § 7-501(4) where no evidence was produced to show that holders had not paid value for receipts, or that transaction was not in regular course of business, or that holders had had actual notice of any claims to receipts or had not acted in good faith. *R.E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

In action by cotton farmers to enjoin defendants from removing 1,640 bales of cotton from warehouse of one defendant, where evidence showed that plaintiffs had sold warehouse receipts representing such

cotton to buyer who paid for receipts by subsequently dishonored checks, and that such buyer later sold receipts to defendants who were unaware that plaintiffs had not been paid therefor, temporary injunction issued by trial court would be dissolved for failure of plaintiffs to establish probable right of recovery, since such receipts were negotiable as bearer paper under UCC § 7-104(1)(a) and UCC § 7-501(2)(a) and had been duly negotiated to defendants in compliance with UCC § 7-501(4), so as to give defendants under UCC § 7-502(b) title to cotton represented by receipts. *R.E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977), *ref. n.r.e* (Oct. 19, 1977).

Bank did not acquire fraudulent warehouse receipts in good faith and without notice of fraud where experienced bank officers should have known from warehouse manager's excuse for wanting to exchange fraudulent receipts for valid receipts in bank's possession, i.e., that warehouse inspector was at warehouse demanding to see valid receipts, that there was insufficient grain to back up fraudulent receipts. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Where government agency had reason to know of lien on cotton, had made no inquiry as to existence of lien beyond inquiring of tenant, and where information that land was leased was readily available, warehouse receipts covering cotton grown on land were not "duly negotiated" to government agency so as to cut off landlord's lien. *Cleveland v. McNabb*, 312 F. Supp. 155 (W.D. Tenn. 1970).

Common carrier becomes owner and holder of bill of lading by seller's delivery and indorsement thereof. *Eazor Exp., Inc. v. Lanza*, 60 Misc. 2d 686 (1969).

B. Pre-Uniform Commercial Code Decisions.

2. Decisions under Code 1942 § 5048.

Where cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton which is not carried out, and good-faith purchaser of receipts for value without notice are both innocent, cotton owner, as the one reposing trust and confidence in another, should be required to

bear the loss. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner intrusted negotiable warehouse receipts, payable to bearer, and samples of cotton to another for use in proposed sale of cotton to cotton buyer with whom owner customarily dealt, owner thereby vested holder of receipts with every indicia of ownership, and, on holder's sale of receipts to a different buyer without knowledge of owner, buyer, who purchased receipts in good faith for value and without notice, became rightful owner of receipts and of cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

That party obtaining possession from cotton owner of negotiable warehouse receipts, payable to bearer, was guilty of a larceny by fraud in falsely representing that he wished to use them in proposed sale of cotton to cotton buyer with whom owner customarily dealt, did not preclude another cotton buyer, to which receipts were sold by holder, from becoming legal owner of receipts and of cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

The rule that when trustee has invested trust property or its proceeds in any other property into which it can be distinctly traced, cestui que trust may follow it into new investment, unless interest of bona fide purchaser for value has intervened, authorizes pledgee of negotiable warehouse receipts payable to bearer to follow proceeds of receipts which were surrendered to pledgors for benefit of pledgee, into cashier's check, payment of which was intercepted by injunctive process based on asserted rights to proceeds. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody has been intrusted by owner. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts could not prevail against a prior pledgee or purchaser of receipts for value without notice, where at time of promise owner's rights to negotiate re-

ceipts had been lost, by valid negotiation thereof by one to whom possession of receipts had been intrusted. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw negotiable warehouse receipts payable to bearer under agreement to sell receipts for pledgee's account, pledgee did not lose superiority of its lien over rights of owner who had originally intrusted possession of receipts to pledgors, unless surrender of receipts by pledgee resulted in subsequent negotiation to a purchaser in good faith for value. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Where pledgors regained possession and control of negotiable warehouse receipts payable to bearer under agreement to sell them for pledgee's account, purchaser of receipts from pledgors acquired absolute title thereto as against both owner who did not authorize pledge, and pledgee. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody of receipt has been intrusted by owner, if at time of such intrusting, receipt may be negotiated by delivery, and person to whom receipt is negotiated acquires such title to goods as person negotiating receipt and depositor of goods or person to whose order they were to be delivered by terms of receipt had or had ability to convey to purchaser in good faith for value. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

3. Decisions under Code 1942 § 5051.

The Uniform Warehouse Receipts Act, as adopted and still in force in Mississippi, does not permit a receipt to be negotiated by anyone except the owner, or person to whom the owner has entrusted possession of the receipt, and the act does not permit a trespasser, a finder, or thief to pass any title to the receipt. *St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co.*, 254 Miss. 598, 181 So. 2d 913 (1966).

Since warehouse receipts were not negotiable at common law, their negotiability is to be measured by our statutes.

Lineburger Bros. v. Hodge, 212 Miss. 204, 54 So. 2d 268 (1951).

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. *Lineburger Bros. v. Hodge*, 212 Miss. 204, 54 So. 2d 268 (1951).

That agent of purchaser of negotiable warehouse receipts, payable to bearer, knew that holder, who had obtained possession thereof by false statements, had previously been employed by cotton buyers furnished no reason for believing that holder had not been buying cotton and was not authorized to sell receipts. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner intrusted negotiable warehouse receipts, payable to bearer, and samples of cotton to another for use in proposed sale of cotton to another for use in proposed sale of cotton to cotton buyer with whom owner customarily dealt, owner thereby vested holder of receipts with every indicia of ownership, and, on holder's sale of receipts to a different buyer without knowledge of owner, buyer, who purchased receipts in good faith for value and without notice, became rightful owner of receipts and of cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

That party obtaining possession from cotton owner of negotiable warehouse receipts, payable to bearer, was guilty of a larceny by fraud in falsely representing that he wished to use them in proposed sale of cotton to cotton buyer with whom owner customarily dealt, did not preclude another cotton buyer, to which receipts were sold by holder, from becoming legal owner of receipts and of cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton which is not carried out, and good-faith purchaser of receipts for value without notice are both innocent, cotton owner, as the one reposing trust and con-

fidence in another, should be required to bear the loss. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody has been intrusted by owner. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

The evidence showed that cotton grower intrusted to cotton factors possession and custody of negotiable warehouse receipts payable to bearer within statute providing that negotiable receipt may be negotiated by owner or by any person to whom possession or custody of receipt has been intrusted by owner, and that receipts were in such form that they could be negotiated by cotton factors by delivery. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Where tenant ginned and stored in a compress and took warehouse receipts for cotton on which there was a landlord's lien, and the receipts were replevied by bank which then obtained possession of and converted the cotton, such facts did not constitute tenant agent of the landlord

so as to estop the landlord from asserting his lien. *Campbell v. Farmers' Bank*, 127 Miss. 668, 90 So. 436 (1922).

4. Decisions under Code 1942 § 7780.

In such case it was a question for the jury as to whether stipulation was complied with. *Pickle v. Receivers of St. Louis & S.F.R. Co.*, 115 Miss. 322, 75 So. 448 (1917).

Bill of lading providing shipper must give notice to general officer within 24 hours after stock reached destination, as condition precedent to injuries to stock, complied with by substantial compliance with its terms and could be waived by station agent. *New Orleans & N.E.R. Co. v. Wood*, 112 Miss. 614, 73 So. 615 (1917).

This section does not apply to interstate shipments. *Southern Ry. v. North State Cotton Co.*, 107 Miss. 71, 64 So. 965 (1914).

This section does not deprive carrier of property without due process, nor does it regulate interstate commerce. *Yazoo & Miss. V. Ry. v. G.W. Bent & Co.*, 94 Miss. 681, 47 So. 805 (1908).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 358 et seq.

15A Am. Jur. 2d, Commercial Codes §§ 53 et seq.

78 Am. Jur. 2d, Warehouses §§ 37 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:361-7:363 (form of negotiation; requirements of "due negotiation").

CJS. 13 C.J.S., Carriers §§ 398-401.

80 C.J.S., Shipping § 259.

93 C.J.S., Warehousemen and Safe Depositories §§ 36-55.

§ 75-7-502. Rights acquired by due negotiation.

(1) Subject to the following section and to the provisions of Section 7-205 [§ 75-7-205] on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

- (a) title to the document;
- (b) title to the goods;
- (c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
- (d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this chapter.

In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

SOURCES: Codes, 1942, § 41A:7-502; Laws, 1966, ch. 316, § 7-502, eff March 31, 1968.

Cross References — Sufficient identification on sale of share in fungible goods, see § 75-2-105(4).

Title acquired by purchaser of goods, see § 75-2-403.

Right of financing agency to stop delivery of goods, see § 75-2-506.

Seller's stoppage of delivery, see § 75-2-705.

Application of treaty, statute, tariff, or regulation, see § 75-7-103.

Buyer of fungible goods as taking free of claim under negotiated warehouse receipt, see § 75-7-205.

Excuse for bailee's failure to deliver goods to person entitled under document, see § 75-7-403.

When no rights conferred by document of title, see § 75-7-503.

Court's order for delivery of goods or issuance of substitute document where document lost, stolen or destroyed, see § 75-7-601.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. Decisions under Code 1942 § 5052.
3. Decisions under Code 1942 § 5058.
4. Decisions under Code 1942 § 5061.
5. Decisions under Code 1942 § 7880.

A. Decisions Under Uniform Commercial Code.

1. In general.

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and

7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. Ga. 1975).

B. Pre-Uniform Commercial Code Decisions.

2. Decisions under Code 1942 § 5052.

Where cotton warehouse receipts were Mississippi contracts, the theft of the receipts occurred in that state, the cotton was stored in Mississippi and was re-

leased under Mississippi law on duplicate receipts, the law of Mississippi was applicable rather than the law of Tennessee, the state in which the stolen warehouse receipts were sold. *Craig v. Columbus Compress & Whse. Co.*, 210 So. 2d 645 (Miss. 1968).

The Uniform Warehouse Receipts Act, as adopted and still in force in Mississippi, does not permit a receipt to be negotiated by anyone except the owner, or person to whom the owner has entrusted possession of the receipt, and the act does not permit a trespasser, a finder, or thief to pass any title to the receipt. *St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co.*, 254 Miss. 598, 181 So. 2d 913 (1966).

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. *Lineburger Bros. v. Hodge*, 212 Miss. 204, 54 So. 2d 268 (1951).

Cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton, which is not carried out, should bear loss, as against good-faith purchaser of receipts for value, without notice. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Purchaser of warehouse receipts, payable to bearer, from holder, in good faith for value and without notice, became rightful owner of receipts and cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

That holder of receipts was guilty of larceny did not preclude buyer from becoming legal owner of receipts and cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Bona fide purchaser for value of warehouse receipts does not acquire title, under Warehouse Receipts Act, when he purchases from mere trespasser. *Tennessee Joint Stock Land Bank v. Bank of Greenwood*, 179 Miss. 534, 172 So. 323 (1937).

The warehouse company holds the property for the holder of the receipt and must account to him therefor. *A.K. Burrow & Co. v. Planters' Oil Mill & Gin Co.*, 138 Miss. 284, 103 So. 9 (1925).

Holder of a negotiable warehouse receipt acquires such title to the goods as the person negotiating it had the ability to convey, and the warehouseman owes such holder the same duty as if the receipt had been issued to him directly. *Love v. People's Compress Co.*, 137 Miss. 622, 102 So. 275 (1924).

3. Decisions under Code 1942 § 5058.

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. *Lineburger Bros. v. Hodge*, 212 Miss. 204, 54 So. 2d 268 (1951).

Cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton, which is not carried out, should bear loss, as against good-faith purchaser of receipts for value, without notice. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

Purchaser of warehouse receipts, payable to bearer, from holder, in good faith for value and without notice, became rightful owner of receipts and cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

That holder of receipts was guilty of larceny did not preclude buyer from becoming legal owner of receipts and cotton. *Weil Bros. v. Keenan*, 180 Miss. 697, 178 So. 90 (1938).

The pledgee of negotiable warehouse receipts payable to bearer acquired a lien superior to any rights of cotton grower who had surrendered possession and custody of receipts to pledgors under such circumstances as to clothe pledgors with indicia of ownership and enable them to negotiate receipts to a bona fide purchaser for value, notwithstanding negotiation of receipts by pledgors was fraudulent or a breach of duty. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts, could not prevail against a prior pledgee or purchaser of receipts for value without notice, where owner's right to negotiate receipts had been lost by valid

negotiation on part of one intrusted with them. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw receipts payable to bearer under agreement to sell for pledgee's account, pledgee did not lose superiority of lien over rights of owner who had intrusted possession to pledgors, unless surrender by pledgee resulted in subsequent negotiation to purchaser in good faith for value. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Rights of owner, subordinated to those of pledgee of receipts, held not restored by pledgors' sale of receipts to innocent purchaser and delivery of proceeds in form of cashier's check to owner. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

4. Decisions under Code 1942 § 5061.

Plaintiff's acceptance of a receipt for certain goods when he knew that a portion of them were missing did not prevent recovery by plaintiff from warehouseman for shortages of goods, the circumstances being such that the unlawful act was not the source of plaintiff's civil rights. *Lawrence Whse. Co. v. Nasif*, 219 F.2d 536 (5th Cir. 1955).

5. Decisions under Code 1942 § 7880.

Provision in bill of lading that carrier shall have benefit of insurance on lost or damaged property held valid. *Yazoo & Miss. V. Ry. v. Blum*, 124 Miss. 318, 86 So. 805 (1921).

Acceptance of freight is prima facie evidenced by bill of lading. *Yazoo & Miss. V. Ry. v. Nichols & Co.*, 120 Miss. 690, 83 So. 5 (1919), aff'd, 256 U.S. 540, 41 S. Ct. 549, 65 L. Ed. 1081 (1921).

Bill of lading construed most strongly against carrier. *Yazoo & Miss. V. Ry. v. G.W. Bent & Co.*, 94 Miss. 681, 47 So. 805 (1908).

Bill of lading describing shipment of cotton as containing designated number of pounds held conclusive on carrier, though above column of weights are words "weight subject to correction." *Yazoo & Miss. V. Ry. v. G.W. Bent & Co.*, 94 Miss. 681, 47 So. 805 (1908).

The statute makes a bill of lading issued by a common carrier conclusive evidence in favor of a bona fide holder as against the carrier receiving the property that the carrier received the property. *Illinois Cent. R.R. v. Lancashire Ins. Co.*, 79 Miss. 114, 30 So. 43 (1901).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 358 et seq., 370.

18 Am. Jur. 2d, Conversion § 20.

78 Am. Jur. 2d, Warehouses §§ 43 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:371, 7:372 (rights acquired by due negotiation).

CJS. 8 C.J.S., Bailments §§ 97, 98.

13 C.J.S., Carriers § 398-401; 80 C.J.S., Shipping § 259.

93 C.J.S., Warehousemen and Safe Depositories §§ 36-55.

§ 75-7-503. Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither

(a) Delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this chapter (Section 75-7-403) or with power of disposition under this code (Sections 75-2-403 and 75-9-320) or other statute or rule of law; nor

(b) Acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this chapter pursuant to its own bill of lading discharges the carrier's obligation to deliver.

SOURCES: Codes, 1942, § 41A:7-503; Laws, 1966, ch. 316, § 7-503, eff March 31, 1968; Laws, 2001, ch. 495, § 16, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote (1)(a).

Cross References — Buyer of fungible goods as taking free of claim under warehouse receipt, see § 75-7-205.

Restriction on rights acquired under duplicate document of title, see § 75-7-402.

Absence of liability for bailee's good faith delivery in accordance with document of title, see § 75-7-404.

Negotiation of document of title, see § 75-7-501.

Rights acquired where due negotiation absent, see § 75-7-504(1).

When rights of transferee subject to defeat in case of non-negotiable document, see § 75-7-504(2).

Seller's right to stop delivery pursuant to non-negotiable document, see § 75-7-504(4).

Freedom of purchaser of document from lien imposed by judicial process, see § 75-7-603.

Excuse from obligation to deliver immediately, in event of adverse claims, see § 75-7-603.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent au-

thority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. *K Furn. Co. v. Sanders Transf. & Storage Co.*, 532 S.W.2d 910 (Tenn. 1975).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, un-

der UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. *Nikolas v. Patrick*, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Feed mill operator leased storage facilities to bonded warehouseman which issued warehouse receipt covering stored grain to bank; held, bank had rights superior to those of farmers who had sold some grain to mill operator and had stored other grain and who had levied attachment on grain stored by mill operator but under warehouseman's control. *Lofton v. Mooney*, 452 S.W.2d 617 (Ky. 1970).

B. Pre-Uniform Commercial Code Decisions.

2. In general.

Landlord's lien on agricultural products as security for unpaid rent is paramount to rights of purchaser of warehouse receipts for product issued in tenant's name in absence of proof that tenant has dealt honestly with his landlord. *Phillips v. Box*, 204 Miss. 231, 37 So. 2d 266 (1948).

Waiver of landlord's lien in favor of purchaser of warehouse receipts for product, issued in tenant's name, is not shown by evidence that landlord accepted farm equipment as part payment of rent and offered to accept tenant's notes for balance, which offer tenant ignored and had cotton crop ginned, baled and placed in warehouse, taking warehouse receipts in his own name and selling warehouse receipts, all without knowledge of landlord who attached cotton promptly after locating it in warehouse. *Phillips v. Box*, 204 Miss. 231, 37 So. 2d 266 (1948).

Pledgee of negotiable warehouse receipts payable to bearer may follow proceeds of receipts which were surrendered to pledgors for benefit of pledgee, into cashier's check, payment of which was intercepted by injunctive process based on asserted rights to proceeds. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts, could not prevail against a prior pledgee or purchaser of receipts for value without notice, where owner's right to negotiate receipts had been lost by valid

negotiation on part of one intrusted with them. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw receipts payable to bearer under agreement to sell for pledgee's account, pledgee did not lose superiority of lien over rights of owner who had intrusted possession to pledgors, unless surrender by pledgee resulted in subsequent negotiation to purchaser in good faith for value. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Where pledgors regained possession of receipts under agreement to sell for pledgee's account, purchaser acquired absolute title as against owner and pledgee. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Rights of owner, subordinated to those of pledgee of receipts, held not restored by pledgors' sale of receipts to innocent purchaser and delivery of proceeds in form of cashier's check to owner. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

A cotton owner's release of cotton at time when he had no notice of rights of pledgee of negotiable warehouse receipts payable to bearer did not constitute such consideration or value as would make owner a purchaser for value, where after loss of his rights in cotton to pledgee, owner's release was ineffective as against pledgee, and warehouse company could have been required to surrender cotton to pledgee or other purchaser in good faith for value. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

The pledgee of negotiable warehouse receipts payable to bearer acquired a lien superior to any rights of cotton grower who had surrendered possession and custody of receipts to pledgors under such circumstances as to clothe pledgors with indicia of ownership and enable them to negotiate receipts to a bona fide purchaser for value, notwithstanding negotiation of receipts by pledgors was fraudulent or a breach of duty. *Lundy v. Greenville Bank & Trust Co.*, 179 Miss. 282, 174 So. 802 (1937).

Evidence held not to warrant finding that landlord clothed tenant with indicia

of ownership of cotton, or was negligent, or lacking in vigilance, so as to be estopped from asserting lien on cotton as against bona fide purchasers of negotiable warehouse receipts, issued in name of tenant, for cotton. *Tennessee Joint Stock Land Bank v. Bank of Greenwood*, 179 Miss. 534, 172 So. 323 (1937).

Breach of agreement between landlord and tenants regarding storage of cotton covered by mortgage and rent and supply liens in favor of landlord, with knowledge of landlord, held not waiver by landlord of rights under mortgage so as to vest title to cotton in tenants or authorize tenants to convey to purchasers in good faith for value by sale of cotton and delivery of negotiable warehouse receipts. *Schmitt v. Federal Compress & Whse. Co.*, 169 Miss. 589, 153 So. 815 (1934).

Buyers of cotton covered by negotiable warehouse receipts issued to tenants who raised cotton and stored it held to have acquired such title to cotton as tenants had or had ability to transfer to buyers in good faith for value. *Schmitt v. Federal Compress & Whse. Co.*, 169 Miss. 589, 153 So. 815 (1934).

Where cotton stored in warehouse by tenants and covered by negotiable warehouse receipts was incumbered by mortgage and rent and supply liens in favor of landlord, tenants held to have no title to

cotton which they could convey to purchasers in good faith for value through sale of cotton and delivery of warehouse receipts. *Schmitt v. Federal Compress & Whse. Co.*, 169 Miss. 589, 153 So. 815 (1934).

Where cotton covered by mortgage and rent and supply liens in favor of landlord was stored in warehouse by one tenant and negotiable warehouse receipts issued to him, sale of cotton by tenants and delivery of warehouse receipts to buyers in good faith for value held not to give buyers title superior to landlord's title under mortgage and liens, where transaction between landlord and tenants did not show that landlord intrusted tenants with indicia of ownership. *Schmitt v. Federal Compress & Whse. Co.*, 169 Miss. 589, 153 So. 815 (1934).

Breach of agreement between landlord and tenants regarding storage of cotton covered by mortgage and rent and supply liens in favor of landlord, with knowledge of landlord, held not waived by landlord of rights under mortgage and liens so as to authorize tenants to convey to purchasers in good faith for value by sale of cotton and delivery of negotiable warehouse receipts. *Schmitt v. Federal Compress & Whse. Co.*, 169 Miss. 589, 153 So. 815 (1934).

RESEARCH REFERENCES

ALR. Title to goods, as between purchaser from, and one who entrusted them to, auctioneer. 36 A.L.R.2d 1362.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 336 et seq., 460.

67 Am. Jur. 2d, Sales §§ 432, 437, 438, 449-451, 455, 456, 462.

78 Am. Jur. 2d, Warehouses §§ 43 et seq., 49 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:381-7:383 (rights acquired by due negotiation; defeat of document of title).

CJS. 8 C.J.S., Bailments § 36.

13 C.J.S., Carriers § 394.

80 C.J.S., Shipping §§ 259-265.

93 C.J.S., Warehousemen and Safe Depositaries §§ 32 et seq.

§ 75-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.

(1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated

(a) by those creditors of the transferor who could treat the sale as void under Section 2-402 [§ 75-2-402]; or

(b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(c) as against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under Section 2-705 [§ 75-2-705], and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

SOURCES: Codes, 1942, § 41A:7-504; Laws, 1966, ch. 316, § 7-504, eff March 31, 1968.

Cross References — Title acquired by purchaser of goods, see § 75-2-403.

Instructions for alteration of goods' destination, see § 75-7-303.

Excuse for bailee's failure to fulfill obligation to deliver, see § 75-7-403.

Transferee's right to endorsement of negotiable document, see § 75-7-506.

JUDICIAL DECISIONS

1. In general.

In interpleader action by bailee of zinc, where evidence showed (1) that bailor, who had stored 300 tons of zinc with bailee, ordered bailee to release all of it to bailor's purchaser, (2) that bailor's purchaser then sold such zinc to alleged bona-fide subpurchaser and ordered bailee to release zinc to subpurchaser, (3) that after bailee had delivered 40 tons to subpurchaser, bailor learned of original purchaser's insolvency and ordered bailee to stop delivery to original purchaser, and (4) that on the same day, subpurchaser also ordered bailee to deliver remainder of such zinc (260 tons) to it, district court denied bailor's motion for summary judgment on its alleged right under UCC §§ 7-504(4) and § 2-705(1) and (2) to stop delivery of zinc, since (1) bailor failed to show, within meaning of UCC § 2-705(2)(b), that bailee had not acknowl-

edged that it was holding the zinc for the subpurchaser, and (2) bailor also had failed to show, within meaning of UCC § 2-705(2)(d), that there had been no negotiation to subpurchaser of any negotiable document of title covering the zinc. *Ceres Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921 (N.D. Ill. 1978).

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and 7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent

in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. Ga. 1975).

Bank did not acquire fraudulent warehouse receipts in good faith and without notice of fraud where experienced bank officers should have known from warehouse manager's excuse for wanting to exchange fraudulent receipts for valid receipts in bank's possession, i.e., that warehouse inspector was at warehouse demanding to see valid receipts, that there was insufficient grain to back up fraudulent receipts. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Buyer's drafts, which described purchased beans by kind and quantity, vested title to beans in buyer under UCC § 7-504, where drafts were documents of title and represented sale of beans of type in which seller had title. Bank, which took possession of seller's assets as secured creditor for purpose of liquidating seller's business, gained no right to these beans by means of its security interest in the inventory of seller, where the beans represented by the warehouse receipt found in seller's safe were in possession of a third party and bank failed to perfect security interest as required by UCC § 9-304 in warehouse receipt. *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976).

RESEARCH REFERENCES

ALR. What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person. 4 A.L.R.2d 213.

Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 6 Am. Jur. 2d, Attachments and Garnishment § 90.

13 Am. Jur. 2d, Carriers §§ 356, 358 et seq., 441.

67 Am. Jur. 2d, Sales §§ 455, 456, 462.

78 Am. Jur. 2d, Warehouses §§ 43 et seq., 49 et seq., 55 et seq., 62, 64 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:391 et seq. (rights acquired in absence of due negotiation; diversion; seller's stoppage of delivery).

CJS. 8 C.J.S., Bailments § 36.

13 C.J.S., Carriers §§ 390, 391, 393, 394.

80 C.J.S., Shipping §§ 256-265.

93 C.J.S., Warehousemen and Safe Depositaries §§ 32-55.

§ 75-7-505. Indorser not a guarantor for other parties.

The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

SOURCES: Codes, 1942, § 41A:7-505; Laws, 1966, ch. 316, § 7-505, *eff* March 31, 1968.

Cross References — Rights acquired by holder of duly negotiated document, see § 75-7-502.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 360, 365, 366.

78 Am. Jur. 2d, Warehouses §§ 43, 46.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:431 (indorsement; document issued by bailee).

CJS. 8 C.J.S., Bailments §§ 86-96, 97, 80 C.J.S., Shipping §§ 256-265.
 98. 93 C.J.S., Warehousemen and Safe De-
 13 C.J.S., Carriers §§ 390, 391, 393, positaries §§ 36-55.
 394.

§ 75-7-506. Delivery without indorsement; right to compel indorsement.

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied.

SOURCES: Codes, 1942, § 41A:7-506; Laws, 1966, ch. 316, § 7-506, eff March 31, 1968.

Cross References — Excuses for bailee's failure to deliver goods to person entitled under document, see § 75-7-403.

Negotiation of document of title, see § 75-7-501.

Indorser's nonliability for default by bailee or previous indorsers, see § 75-7-505.

RESEARCH REFERENCES

<p>Am Jur. 13 Am. Jur. 2d, Carriers §§ 362, 364. 67 Am. Jur. 2d, Sales §§ 432, 437, 438, 449-451, 455, 456. 78 Am. Jur. 2d, Warehouses § 41. 6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms § 7:441, 7:442 (delivery without indorsement; right to compel indorsement).</p>	<p>CJS. 6A C.J.S., Assignments § 50. 13 C.J.S., Carriers §§ 390, 391, 393, 394. 80 C.J.S., Shipping § 259. 93 C.J.S., Warehousemen and Safe Depositories §§ 41-49.</p>
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§ 75-7-507. Warranties on negotiation or transfer of receipt or bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

(a) that the document is genuine; and

(b) that he has no knowledge of any fact which would impair its validity or worth; and

(c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

SOURCES: Codes, 1942, § 41A:7-507; Laws, 1966, ch. 316, § 7-507, eff March 31, 1968.

Cross References — Warranties on sale of goods, see §§ 75-2-312 to 75-2-318.

Collecting bank's warranties, see § 75-7-508.

JUDICIAL DECISIONS

1. In general.

When cotton merchant sold nonexistent cotton represented by warehouse receipts to broker, it breached warranty contained

in § 7-507. *Simon v. Estate of Allen*, 497 S.W.2d 800 (Tex. Civ. App. 1973), ref. n.r.e., cert. denied, 419 U.S. 843, 95 S. Ct. 76, 42 L. Ed. 2d 71 (1974).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 360, 365, 366.

67 Am. Jur. 2d, Sales §§ 432, 437, 438, 449-451, 455, 456.

78 Am. Jur. 2d, Warehouses §§ 46, 57.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:451-7:453 (war-

rancies; on negotiation or transfer).

CJS. 8 C.J.S., Bailments §§ 97-98.

13 C.J.S., Carriers §§ 390, 391, 393, 394.

80 C.J.S., Shipping § 259.

93 C.J.S., Warehousemen and Safe Depositories §§ 41-49.

§ 75-7-508. Warranties of collecting bank as to documents.

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

SOURCES: Codes, 1942, § 41A:7-508; Laws, 1966, ch. 316, § 7-508, eff March 31, 1968.

Cross References — Instructions to collecting bank, see § 75-4-203.

Collection of documentary drafts, see §§ 75-4-501 to 75-4-504.

Warranties on negotiation or transfer of document of title, see § 75-7-507.

JUDICIAL DECISIONS

1. In general.

UCC § 7-508 specifically limits the warranties of a collecting bank with respect to documents. *First Trust & Sav. Bank v.*

Fidelity-Philadelphia Trust Co., 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks §§ 976, 978, 990 et seq.

13 Am. Jur. 2d, Carriers § 337.

78 Am. Jur. 2d, Warehouses § 46.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:461 (warranties of collecting bank.

CJS. 9 C.J.S., Banks and Banking §§ 408, 409, 411, 414.

13 C.J.S., Carriers §§ 390, 391, 393, 394.

93 C.J.S., Warehousemen and Safe Depositories §§ 41-49.

§ 75-7-509. Receipt or bill: when adequate compliance with commercial contract.

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the chapters on Sales (Chapter 2) and on Letters of Credit (Chapter 5).

SOURCES: Codes, 1942, § 41A:7-509; Laws, 1966, ch. 316, § 7-509, eff March 31, 1968.

- Cross References — Sales, see §§ 75-2-101 et seq.
Formation of sales contract, see §§ 75-2-201 et seq.
Letters of credit, see §§ 75-5-101 et seq.
Formal requirements of letters of credit, see § 75-5-104.
Consideration requisite for letter of credit, see § 75-5-105.

RESEARCH REFERENCES

- | | | |
|-----------------------|-----------------------|---|
| Am Jur. 13 | Am. Jur. 2d, Carriers | and translation or interpretation of mes- |
| § 360. | | sage). |
| 78 Am. Jur. 2d, | Warehouses §§ 71, 73. | 6 Am. Jur. Pl & Pr Forms (Rev), Sales, |
| 6 Am. Jur. Pl & Pr | Forms (Rev), Letters | Forms 2:11 et seq. (form, formation, and |
| of Credit, Forms 5:1 | et seq. (advice of | readjustment of contract). |
| credit; confirmation; | risks of transmission | |

PART 6.

WAREHOUSE RECEIPTS AND BILLS OF LADING MISCELLANEOUS PROVISIONS.

- SEC.
- | | |
|-----------|---|
| 75-7-601. | Lost and missing documents. |
| 75-7-602. | Attachment of goods covered by a negotiable document. |
| 75-7-603. | Conflicting claims; interpleader. |

§ 75-7-601. Lost and missing documents.

- (1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of nonsurrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.
- (2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at

the time of posting to indemnify any person injured by the delivery who files a notice of claim within one (1) year after the delivery.

SOURCES: Codes, 1942, § 41A:7-601; Laws, 1966, ch. 316, § 7-601, eff March 31, 1968.

Cross References — Application of tariffs and classifications to documents of title, see § 75-7-103.

Rights acquired on negotiation of document notwithstanding document's loss, theft, etc., see § 75-7-502(2).

Lost, destroyed and stolen securities, see § 75-8-405.

JUDICIAL DECISIONS

1. In general.

This section does not make it mandatory upon a warehouseman to institute suit where an original outstanding receipt

has been lost or destroyed. *St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co.*, 254 Miss. 598, 181 So. 2d 913 (1966).

RESEARCH REFERENCES

Am Jur. 13 *Am. Jur.* 2d, Carriers §§ 447, 462.

18 *Am. Jur.* 2d, Conversion § 20.

52 *Am. Jur.* 2d, Lost and Destroyed Instruments §§ 3 et seq.

78 *Am. Jur.* 2d, Warehouses § 132.

6 *Am. Jur. Pl & Pr Forms* (Rev), Warehouse Receipts, Forms 7:21-7:23 (lost and missing documents of title).

19 *Am. Jur. Legal Forms* 2d, Uniform

Commercial Code: Article 7 — Warehouse Receipts, Bills of Lading and Other Documents of Title, §§ 253:2751 et seq. (lost and missing documents).

CJS. 13 *C.J.S.*, Carriers §§ 390, 391, 393, 394.

54 *C.J.S.*, Lost Instruments §§ 2 et seq.

93 *C.J.S.*, Warehousemen and Safe Depositories §§ 41-49.

§ 75-7-602. Attachment of goods covered by a negotiable document.

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

SOURCES: Codes, 1942, § 41A:7-602; Laws, 1966, ch. 316, § 7-602, eff March 31, 1968.

Cross References — Attachment at law, see §§ 11-33-1 et seq.

When document of title confers no right against person having prior interest in goods, see § 75-7-503.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.

B. Pre-Uniform Commercial Code Decisions.

2. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

A savings and loan association passbook is not a negotiable instrument within the meaning of this section. *American Express Co. v. Vella*, 92 N.J. Super. 380, 223 A.2d 515 (1966), *aff'd*, 94 N.J. Super. 258, 227 A.2d 721 (1967), certification denied, 49 N.J. 364, 230 A.2d 397 (1967).

B. Pre-Uniform Commercial Code Decisions.

2. In general.

Ginner turning over gin receipts received on delivery of cotton to compress waived his lien thereon. *Quiver Gin Co. v. Looney*, 144 Miss. 709, 111 So. 107 (1927).

Warehouseman who suffers goods to be taken from his possession under a writ of attachment issued in a proceeding to which the holder of the receipt is not a party, without taking up and cancelling the receipt must account to the holder of the receipt for the value of the goods. *Love v. People's Compress Co.*, 137 Miss. 622, 102 So. 275 (1924).

RESEARCH REFERENCES

ALR. Allowance of attorney's fees to party interpleading claimants to funds or property. 48 A.L.R.2d 190.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment § 90.

8 Am. Jur. 2d, Bailments § 67.

78 Am. Jur. 2d, Warehouses §§ 63, 135.

6 Am. Jur. Pl & Pr Forms (Rev), Ware-

house Receipts, Forms 7:31-7:36 (attachment of goods covered by negotiable document of title).

2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (proof of wrongful attachment).

CJS. 7 C.J.S., Attachment §§ 206, 219, 220.

§ 75-7-603. Conflicting claims; interpleader.

If more than one (1) person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for nondelivery of the goods, or by original action, whichever is appropriate.

SOURCES: Codes, 1942, § 41A:7-603; Laws, 1966, ch. 316, § 7-603, *eff* March 31, 1968.

Cross References — Proceedings when third party claims subject matter, see §§ 11-23-1, 11-23-3.

RESEARCH REFERENCES

ALR. Allowance of attorneys' fees to party interpleading claimants to funds or property. 48 A.L.R.2d 190.

Am Jur. 8 Am. Jur. 2d, Bailments §§ 193, 194.

13 Am. Jur. 2d, Carriers § 477.

45 Am. Jur. 2d, Interpleader §§ 7 et seq.
78 Am. Jur. 2d, Warehouses §§ 133 et
seq., 170.

6 Am. Jur. Pl & Pr Forms (Rev), Ware-
house Receipts, Forms 7:51-7:54 (conflict-
ing claims; interpleader).

CJS. 48 C.J.S., Interpleader §§ 10 et
seq.

93 C.J.S., Warehousemen and Safe De-
positaries § 120.

CHAPTER 8

Uniform Commercial Code—Revised Article 8. Investment Securities

Part 1.	Short Title and General Matters.....	75-8-101
Part 2.	Issue and Issuer.....	75-8-201
Part 3.	Transfer of Certificated and Uncertificated Securities.....	75-8-301
Part 4.	Registration.....	75-8-401
Part 5.	Security Entitlements.....	75-8-501

Editor’s Note — The following table lists the provisions of Article 8 of Title 75 of the Mississippi Code, as it existed prior to 1996 (under the heading Prior Article 8), and the corresponding provisions in Revised Article 8, as enacted in 1996 (under the heading Revised Article 8), which relate to the subject matter of the original provisions of Article 8. Where there is no corresponding provision, the notation “Omitted” appears in the table.

Prior Article 8	Revised Article 8
75-8-101	75-8-101
75-8-102	75-8-102
75-8-103	75-8-209
75-8-104	75-8-210
75-8-105	75-8-114
75-8-106	75-8-110
75-8-107	Omitted
75-8-108	Omitted
75-8-201	75-8-201
75-8-202	75-8-202
75-8-203	75-8-203
75-8-204	75-8-204
75-8-205	75-8-205
75-8-206	75-8-206
75-8-207	75-9-207
75-8-208	75-8-208
75-8-301	75-8-302
75-8-302	75-8-75-8-102, 75-8-302, 75-8-303
75-8-303	75-8-102
75-8-304	75-8-105
75-8-305	75-8-105
75-8-306	75-8-108, 75-8-306
75-8-307	75-8-304
75-8-308	75-8-102, 75-8-107, 75-8-304, 75-8-305
75-8-309	75-8-304
75-8-310	75-8-304
75-8-311	75-8-304
75-8-312	75-8-306
75-8-313	Omitted
75-8-314	Omitted
75-8-315	Omitted
75-8-316	75-8-307
75-8-317	75-8-112
75-8-318	75-8-115
75-8-319	Omitted

Prior Article 8	Revised Article 8
75-8-320	Omitted
75-8-321	Omitted
75-8-401	75-8-401
75-8-402	75-8-402
75-8-403	75-8-403
75-8-404	75-8-404
75-8-405	75-8-405, 75-8-406
75-8-406	75-8-407
75-8-407	Omitted
75-8-408	Omitted

PART 1.

SHORT TITLE AND GENERAL MATTERS.

SEC.	
75-8-101.	Short title.
75-8-102.	Definitions.
75-8-103.	Rules for determining whether certain obligations and interests are securities or financial assets.
75-8-104.	Acquisition of security or financial asset or interest therein.
75-8-105.	Notice of adverse claim.
75-8-106.	Control.
75-8-107.	Whether indorsement, instruction, or entitlement order is effective.
75-8-108.	Warranties in direct holding.
75-8-109.	Warranties in indirect holding.
75-8-110.	Applicability; choice of law.
75-8-111.	Clearing corporation rules.
75-8-112.	Creditor's legal process.
75-8-113.	Statute of frauds inapplicable.
75-8-114.	Evidentiary rules concerning certificated securities.
75-8-115.	Securities intermediary and others not liable to adverse claimant.
75-8-116.	Securities intermediary as purchaser for value.

§ 75-8-101. Short title.

This chapter may be cited as Uniform Commercial Code—Revised Article 8. Investment Securities.

SOURCES: Laws, 1996, ch. 468, § 2, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-101 [Codes, 1942, § 41A:8-101; Laws, 1966, ch. 316, § 8-101] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

Laws, 1996, ch. 468, §§ 1, 72, provide as follows:

"SECTION 1. The purpose of this act is to repeal the chapter of law known as the "Uniform Commercial Code-Investment Securities" and to recodify replacement versions of that law under the same chapter number in the Mississippi Code of 1972, which provisions are to be known as the "Uniform Commercial Code—Revised Article 8. Investment Securities.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Bonds of county water, sewer, garbage disposal, and fire protection, see § 19-5-183.

Bonds for improvement, development and maintenance of sixteenth section lands being securities within meaning of this chapter, see § 29-3-169.

Applicability of this chapter to bonds issued by the Wavelands Regional Wastewater Management District, see § 49-17-201.

Applicability of this chapter to bonds issued by the Mississippi Gulf Coast Regional Wastewater Authority, see § 49-17-341.

Provision that bonds issued by a joint water management district shall be securities within the meaning of Article 8 of the Uniform Commercial Code (§§ 75-8-101 et seq.), see § 51-8-37.

Bonds and interest coupons issued for Bienville Recreational District being securities within meaning of this chapter, see § 55-19-19.

Provisions of the Mississippi Securities Act, generally, see §§ 75-71-101 et seq.

Bonds issued by municipalities and joint agencies being securities within meaning of this chapter, see § 77-5-739.

Small business investment companies, see §§ 79-7-1 et seq.

Investment trusts, see §§ 79-15-1 et seq.

Exchanges authorized, see § 87-1-11.

Who authorized to provide market quotations, see § 87-1-13.

Fiduciary security transfers, see §§ 91-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

Notwithstanding Idaho statutory and common-law principles concerning gifts and the creation of joint tenancies, transfers of investment securities are governed by Article 8 of the Idaho Uniform Commercial Code (UCC §§ 8-101 et seq). However, where Article 8 is silent as to the applicable law, the Idaho court's disposition of a transfer of such securities, under Idaho UCC § 1-103, is governed by principles of law and equity that supplement the provisions of the Idaho Uniform Commercial Code. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Building and Loan Association shares which represent the withdrawal capital account of the association, as distinguished from permanent reserve shares, are not subject to Article 8 of the Code. In *re Estate of Morey*, 38 Ill. 2d 575, 232 N.E.2d 734 (1967).

Under the Uniform Commercial Code as adopted in Pennsylvania there is no requirement that a contract be evidenced by a single instrument, and if the parties wish, they may express their agreement

in more than one writing, and in such circumstances the several documents are to be interpreted together, each one contributing, to the extent of its worth, to the ascertainment of the true intent of the parties, and this rule was held applicable to an agreement for the sale of securities. *Stern & Co. v. State Loan & Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965).

The Code continues the policy of the Uniform Stock Transfer Act of making the certificate represent the shares of stock. *Lesavoy Indus., Inc. v. Pennsylvania Gen. Paper Corp.*, 404 Pa. 161, 171 A.2d 148 (1961).

Article 8 apparently does not apply to shares represented by certificates issued before the effective date of the Code. *Lesavoy Industries, Inc. v. Pennsylvania General Paper Corp.* (1961) 404 Pa. 161, 171 A.2d 148, in which the court so stated without explaining that the situs of the stock was governed by the Uniform Stock Transfer Act, now embodied in the Code, the policy of which is to make the certificate represent the share of stock. *Lesavoy Indus., Inc. v. Pennsylvania Gen. Paper Corp.*, 404 Pa. 161, 171 A.2d 148 (1961).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 8, dealing with investment securities. 21 A.L.R.3d 964.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 15, 26.

15A Am. Jur. 2d, Commercial Code §§ 69.

18 Am. Jur. 2d, Corporations §§ 19, 21, 484 et seq., 681 et seq.

Transfer of shares, 7 Am. Jur. Pl & Pr Forms (Rev), Corporations, Forms 91-103.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2771 et seq. (investment securities).

CJS. 18 C.J.S., Corporations §§ 129 et seq., 172 et seq., 217 et seq.

Law Reviews. Vaaler, Symposium on the Uniform Commercial Code: Revised Article 8 of the Mississippi UCC: Dealing Directly With Indirect Holding. 66 Miss. L. J. 249, Winter, 1996.

§ 75-8-102. Definitions.

(a) In this chapter:

(1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) "Bearer form," as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) "Certificated security" means a security that is represented by a certificate.

(5) "Clearing corporation" means:

(i) A person that is registered as a "clearing agency" under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) "Communicate" means to:

(i) Send a signed writing; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of Section 75-8-501(b)(2) or (3), that person is the entitlement holder.

(8) "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) “Financial asset,” except as otherwise provided in Section 75-8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter. As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) “Good faith,” for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(11) “Indorsement” means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) “Instruction” means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) “Registered form,” as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) “Securities intermediary” means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) “Security,” except as otherwise provided in Section 75-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this chapter.

(16) "Security certificate" means a certificate representing a security.

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this chapter.

(18) "Uncertificated security" means a security that is not represented by a certificate.

(b) Other definitions applying to this chapter and the sections in which they appear are:

Appropriate person	Section 75-8-107
Control	Section 75-8-106
Delivery	Section 75-8-301
Investment company security	Section 75-8-103
Issuer	Section 75-8-201
Overissue	Section 75-8-210
Protected purchaser	Section 75-8-303
Securities account	Section 75-8-501

(c) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

(d) The characterization of a person, business, or transaction for purposes of this chapter does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

SOURCES: Laws, 1996, ch. 468, § 3, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-102 [Codes, 1942, § 41A:8-102; Laws, 1966, ch. 316, § 8-102; 1974, ch. 382; 1990, ch. 384, § 1, from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Code's provisions respecting commercial paper as inapplicable to investment securities, see § 75-3-103(1).

Definition of "documentary draft," see § 75-4-104.

Effect of issuer's restrictions on transfer, see § 75-8-204.

State trust company deposit requirements, see § 81-27-5.301.

JUDICIAL DECISIONS

1. In general; "security".
2. —Stock certificate as security.
3. —Stock of closely-held corporation.
4. —Treasury bill as security.
5. —Other "securities".
6. "Broker".
7. Other terms.

1. In general; "security".

Certificates of participation in eight promissory notes were not "investment securities" within meaning of UCC Article 8 where such certificates were not issued in "bearer" or "registered form" under UCC § 8-102, and (2) none of such certifi-

cates was “one of a class or series or by its terms...divisible into a class or series of instruments” within meaning of UCC § 8-102. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.* (1978, SD NY) 452 F Supp 1108, 24 UCCRS 1199, remanded without op (CA2 NY) 607 F2d 994. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 24 U.C.C. Rep. Serv. 1199 (S.D.N.Y. 1978), remanded without op, 607 F.2d 994 (2d Cir. N.Y. 1979); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979) (applying New York UCC; holding that banks to which such certificates were issued were holders of the underlying promissory notes, rather than owners of investment securities, and that their rights were therefore governed by UCC Article 3).

An instrument can qualify as a “security” under UCC § 8-102, even though it has never been traded on any securities exchange or market. The question under this section of the code is whether a particular instrument “is of a type” that is commonly dealt in on securities exchanges or markets, or “is of a type” that is commonly recognized as a medium for investment in any area in which it is issued or dealt in. *E.H. Hinds, Inc. v. Coolidge Bank & Trust Co.*, 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Creditor who loaned money to debtor to purchase stock in exchange for security interest in stock did not have perfected, secured interest in stock, where stock certificate was not issued to creditor until after bankruptcy filing. *Williams v. Indi-Bel, Inc.*, 167 B.R. 77 (Bankr. N.D. Miss. 1994).

2. —Stock certificate as security.

Stock certificates are “securities” within Code provision conferring negotiability upon securities, administrator of estate of purchaser of stock need not be “record owner” of stock in order to enforce right thereunder. *New England Merchants Nat’l Bank v. Old Colony Trust Co.*, 356 Mass. 612, 254 N.E.2d 891 (1970).

Stock warrants, under Michigan law, are investment securities. *E.F. Hutton & Co. v. Manufacturers Nat’l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

Article 8 was intended to include all shares of stock and not merely those dealt with by security brokers. *Previti v. Rubenstein*, 3 U.C.C. Rep. Serv. 882 (1966, NY Sup).

In determining whether certain stock rights were securities within the meaning of the Securities Exchange Act of 1934, the proposed final draft of 1950 of UCC § 8-102, which defined “security”, was quoted by the court. *Silverman v. Landa*, 306 F.2d 422 (2d Cir. N.Y. 1962).

3. —Stock of closely-held corporation.

Stock in close family corporate business which is not type of stock that is commonly traded on securities exchanges or markets, and which also is not commonly recognized by such exchanges or markets as a medium of investment, is not an “investment security” within meaning of UCC § 8-102. *Zamore v. Whitten*, 395 A.2d 435, 4 A.L.R.4th 899 (Me. 1978), overruled on other grounds, 595 A.2d 1027 (Me. 1991).

In action for specific performance of contract to purchase stock in closely held corporation, where plaintiff offered in letter to sell stock to defendant and claimed that defendant had orally accepted such offer and then refused to perform, and where defendant denied that he had orally accepted plaintiff’s offer and claimed that he had never signed any writing that obligated him to buy such stock and that a writing was required by statute of frauds contained in UCC § 8-319 (dealing with contracts for sale of securities), trial court’s granting of summary judgment for defendant, on basis of defendant’s affirmative defense of statute of frauds, was reversible error where defendant failed conclusively to prove essential elements of such defense, namely, (1) that subject matter of alleged sale was “securities” as defined in UCC § 8-102, and (2) that there was no written contract to purchase such securities (observing, in connection with defendant’s failure to prove as matter of law that stock allegedly sold to him constituted “securities” under UCC § 8-102, that he probably could not have proved such point as a matter of law since the question was one of fact). *Kenney v. Porter*, 557 S.W.2d 589 (Tex. Civ. App. 1977).

Stock certificates of corporation which had fewer than four stockholders and whose only substantial asset was structure housing two professional offices, were "securities" within meaning of UCC § 8-102; thus, alleged oral agreement among stockholders of corporation which, in effect, conferred upon each of them first refusal rights if any other stockholder wished to sell his stock, was unenforceable under UCC § 8-319. *Pantel v. Becker*, 89 Misc. 2d 239 (1977).

Where debtor transferred title to his home to corporation of which he was sole stockholder, debtor's stock certificate was not a security as defined by UCC § 8-102 and creditor could not invoke provisions of UCC Article 8 to satisfy debt. *Rhode Island Hosp. v. Collins*, 117 R.I. 535, 368 A.2d 1225 (1977).

4. —Treasury bill as security.

United States treasury bills are "securities" within meaning of UCC § 8-102. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978) (applying Illinois law).

United States treasury bills are investment securities as defined by UCC § 8-102 and are governed Article 8 and not Article 3. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action against stockbroker for having sold stock held as community property on instructions of plaintiff's former husband and delivered proceeds to him in treasury bills, treasury bills met all requirements of securities under UCC §§ 8-102 and 8-318, negating liability of broker for conversion in sale of securities according to instructions of principal; immunization from liability extended to delivery of proceeds to principal authorizing sale so long as good faith existed on part of broker. *Martinez v. Dempsey-Tegeler & Co.*, 37 Cal. App. 3d 509 (2d Dist. 1974).

5. —Other "securities".

Debentures are "securities" within meaning of UCC § 8-102. *E.H. Hinds, Inc. v. Coolidge Bank & Trust Co.*, 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Corporate notes that were "of a type

commonly dealt in upon securities exchanges or markets" constituted "intangible investment security" within meaning of UCC § 8-102 notwithstanding such notes were never publicly traded. *Baker v. Gotz*, 387 F. Supp. 1381 (D. Del. 1975), aff'd, 523 F.2d 1050 (3d Cir. Del. 1975) (applying Delaware law).

Stock certificates issued in bearer form were "securities," as defined in UCC § 8-102, and negotiable instruments under UCC § 8-105; thus, where there was evidence showing agreement of joint ownership with survivorship between decedent and her brother, where brother always had possession of one certificate and other certificate was delivered by decedent to her brother prior to her death, and where there was no evidence that delivery was procured by fraud or duress, brother had lawful possession of and owned stock certificates. *Eastman v. Mendrick*, 218 Kan. 78, 542 P.2d 347 (1975).

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained \$20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. *Victory Nat'l Bank v. Oklahoma State Bank*, 520 P.2d 675 (Okla. 1973).

A "call" is not a "security" within the definition of UCC § 8-102, thus, UCC § 8-319 is inapplicable to a call option.

Cohn, Ivers & Co. v. Gross, 56 Misc. 2d 491 (1968).

6. "Broker".

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201(44), value was given for transfer of stock when father-in-law accepted stock as security for pre-existing claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301(2), he acquired stock free of bank's adverse claim. *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. Utah 1974).

7. Other terms.

There is no "issuance" in meaning of UCC § 8-102 unless it is determined that there is voluntary transfer of possession to holder or remitter. *Bankhaus Hermann Lampe KG v. Mercantile-Safe Deposit & Trust Co.*, 466 F. Supp. 1133 (S.D.N.Y. 1979).

In action by bank against mortgage company for breach of contract to sell bank mortgage-backed securities guaranteed by Government National Mortgage Association (GNMA), where evidence showed (1) that such sale was orally arranged by mortgage broker, (2) that mortgage company did not authorize broker to make contract with bank, but contemplated solicitation of offer to buy at speci-

fied price, subject to acceptance of proposed written commitment, and (3) that mortgage company repudiated oral contract made by broker on October 1, 1973, long before date fixed for contract's performance, court held (1) that mortgage company was not liable to bank, since it did not authorize broker to make oral contract in suit and did not subsequently ratify it, (2) broker, because of breach of its implied warranty of authority, was liable to bank for all damages resulting from such breach, (3) letter sent by bank to confirm oral contract satisfied statute of frauds provision in UCC § 8-319, since it was written promptly, was received by party against whom enforcement was sought (mortgage company), and was not objected to in writing within ten days, (4) securities involved were investment securities within meaning of UCC § 8-102, (5) bank did not attempt to "cover" such securities by independent purchases on the market, (6) bank's damages were to be measured by damages that bank could have recovered from nonperforming seller for breach of an authorized contract, (7) under UCC § 2-713(1), such measure of damages was difference between market price of securities at time when bank, as purchaser thereof, learned of breach and contract price of securities, (8) phrase "at the time when the buyer learned of the breach" in UCC § 2-713(1) means, in present suit, "at the time the buyer learned of the repudiation," and (9) UCC § 2-713(1) would be interpreted to measure bank's damages as occurring "within a commercially reasonable time" after bank learned of repudiation of oral contract (applying New Jersey law; holding that because of circumstances in GNMA securities market at time of mortgage company's anticipatory repudiation of oral contract in suit, a commercially reasonable time for bank to await performance, as provided by UCC § 2-610(a), did not extend substantially beyond date on which repudiation occurred). *First Nat'l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law of Rhode Island, alleging that her signature had been forged on transfer

indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent, under UCC § 8-102 transfer of stock

certificates by transfer agent was investment security transaction within contemplation of Article 8 of UCC. *Reinhard v. Textron, Inc.*, 516 P.2d 1325 (Okla. 1973).

ATTORNEY GENERAL OPINIONS

UCC Investment Securities Law, Miss. Code Section 75-8-102, recognizes both physical instrument representing "secu-

rity" and "book entry" representation of "security". Sheppard, Feb. 18, 1993, A.G. Op. #93-0018.

RESEARCH REFERENCES

ALR. What is a "security" under UCC Art 8. 11 A.L.R.4th 1036.

Partnership and joint venture interests as securities within meaning of federal Securities Act of 1933 (15 USCS §§ 77a et seq.) and Securities and Exchange Act of 1934 (15 USCS §§ 78a et seq). 58 A.L.R. Fed. 408.

Commodities futures contract or account as included in meaning of "security" as defined in § 3(a)(10) of the Securities Exchange Act of 1934 (15 USCS § 78c(a)(10)). 58 A.L.R. Fed. 616.

"Risk capital" test for determination of whether transaction involves security, within meaning of federal Securities Act of 1933 (15 USCS §§ 77a et seq.) and Securities Exchange Act of 1934 (15 USCS §§ 78a et seq.), 68 A.L.R. Fed. 89.

Am Jur. 4 Am. Jur. 2d, Alteration of Instrument § 28.

11 Am. Jur. 2d, Bills and Notes § 15.

12 Am. Jur. 2d, Bonds § 74.

15A Am. Jur. 2d, Commercial Code §§ 69, 70, 71.

18 Am. Jur. 2d, Corporations § 21.

18A Am. Jur. 2d, Corporations §§ 509, 681 et seq.

50 Am. Jur. 2d, Letters of Credit §§ 3, 5, 10, 19.

"Instrument" defined, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:93.

Instruction to jury; definition of security, 6 Am. Jur. Pl & Pr Forms, Investment Securities, Form 8:2.

Definitions, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2781 et seq.

CJS. 18A C.J.S., Corporations §§ 217 et seq., 19 C.J.S., Corporations §§ 664 et seq.

§ 75-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this chapter, or it is an investment company security. However, an interest in a

partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this chapter and not by Chapter 3, even though it also meets the requirements of that chapter. However, a negotiable instrument governed by Chapter 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in Section 75-9-102(a)(15), is not a security or a financial asset.

SOURCES: Laws, 1996, ch. 468, § 4; Laws, 2001, ch. 495, § 17, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-103 [Codes, 1942, § 41A:8-103; Laws, 1966, ch. 316, § 8-103; 1990, ch. 384, § 2, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, substituted "Section 75-9-102(a)(15)" for "Section 75-9-115" in (f).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 87, 88.

18A Am. Jur. 2d, Corporations § 864.
68A Am. Jur. 2d, Secured Transactions § 19.

CJS. 79A C.J.S., Securities Regulation §§ 345, 351.

9 C.J.S. Banks and Banking §§ 514, 516.

§ 75-8-104. Acquisition of security or financial asset or interest therein.

(a) A person acquires a security or an interest therein, under this chapter, if:

(1) The person is a purchaser to whom a security is delivered pursuant to Section 75-8-301; or

(2) The person acquires a security entitlement to the security pursuant to Section 75-8-501.

(b) A person acquires a financial asset, other than a security, or an interest therein, under this chapter, if the person acquires a security entitlement to the financial asset.

(c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in Part 5 of this chapter, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in Section 75-8-503.

(d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by

causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b).

SOURCES: Laws, 1996, ch. 468, § 5, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-104 [Codes, 1942, § 41A:8-104; Laws, 1966, ch. 316, § 8-104; 1990, ch. 384, § 3, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 69, 70, 71, 78, 83, 98, 115, 117. **CJS.** 79A C.J.S., Securities Regulation § 334.
18A Am. Jur. 2d, Corporations §§ 864, 935-937.

§ 75-8-105. Notice of adverse claim.

(a) A person has notice of an adverse claim if:

- (1) The person knows of the adverse claim;
- (2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or
- (3) The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

- (1) One (1) year after a date set for presentment or surrender for redemption or exchange; or
- (2) Six (6) months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) Whether in bearer or registered form, has been indorsed “for collection” or “for surrender” or for some other purpose not involving transfer; or

(2) Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under Chapter 9 is not notice of an adverse claim to a financial asset.

SOURCES: Laws, 1996, ch. 468, § 6, eff from and after July 1, 1996.

Editor’s Note — Former § [Codes, 1942, § 41A:8-105; Laws, 1966, ch. 316, § 8-105; 1990, ch 384, § 4, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — Collecting banks, see §§ 75-4-201 et seq.

Effect of overissue, see § 75-8-104.

“Bona fide purchaser,” see § 75-8-302.

Staleness as notice of adverse claims, see § 75-8-305.

Registration of security transfers, see §§ 75-8-401 et seq.

JUDICIAL DECISIONS

1. In general.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

Purchasers of corporate stock acquire only rights of converters they purchased from under UCC § 8-304 where purchasers had notice of adverse claim upon reading newspaper article after which they arranged and attended press conference with converters. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

While UCC § 8-304 specifies three situations in which one will be deemed to have constructive notice as a matter of law, the list is not exhaustive. On the contrary, as noted in Official Comment 1, the trier of fact may determine that the suspicious characteristics of the transaction constitute the reason to know that is necessary to establish notice. This is particularly

true in the case of a commercially sophisticated purchaser, such as a bank. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Under UCC §§ 8-304 and 1-201(25), either actual or constructive notice will prevent one from obtaining the status of a bona fide purchaser. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Bank knew of some “adverse claim” as matter of law, under UCC § 8-304, as to securities which bank said it believed belonged to corporation, but which it cashed for individual benefit of corporation’s officers, to pay bank’s and its officer’s claims against them and commissions to them. *Fidelity Std. Life Ins. Co. v. First City Fin. Corp.*, 325 So. 2d 879 (La. App. 1976), application denied, 329 So. 2d 465 (La. 1976).

Stockbroker who purchased stolen treasury notes from bank which sold notes on behalf of bank’s customer, was purchaser in good faith under UCC §§ 8-301 and 8-304 and, thus, was not liable for conversion of notes, notwithstanding transmittal slips from bank to broker stated that transactions were for account of named person, where broker bought notes with-

out knowledge of any suspicious circumstances from bank with whom it had been dealing over the years. *United States Fid. & Guar. Co. v. Royal Nat'l Bank*, 545 F.2d 1330 (2d Cir. N.Y. 1976).

Bank which received stock of 83-year-old woman as collateral for loan to corporation, took with notice of adverse claim within meaning of UCC § 8-304, although bank received stock from individual under written authority from woman to pledge stock, where bank had knowledge that individual stood in fiduciary relationship to owner of stock as her investment counselor for many years, and where bank was aware that loan proceeds were for benefit of corporation controlled by such person. *Seattle-First Nat'l Bank v. Randall*, 532 F.2d 1291 (9th Cir. Or. 1976).

Failure of bank to investigate borrower or his right to negotiate stolen bearer bonds that bank accepted as collateral for loan did not constitute bad faith precluding bank from enjoying status of bona fide purchaser. *Gutekunst v. Continental Ins. Co.*, 486 F.2d 194 (2d Cir. N.Y. 1973).

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account

with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301 since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. *Phoenix Ins. Co. v. National Bank & Trust Co.*, 366 F. Supp. 340 (M.D. Pa. 1972), *aff'd*, 485 F.2d 681 (3d Cir. Pa. 1973).

A selling broker is recognized as a "purchaser" under this section. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), *reargument granted*, 21 N.Y.2d 1041 (1968), *on reargument*, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bonds § 34.
18A Am. Jur. 2d, Corporations §§ 541-549, 709 et seq.

"Notice" and "knowledge" of a fact defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

CJS. 18B C.J.S., Corporations §§ 143, 670 et seq.

§ 75-8-106. Control.

(a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is endorsed to the purchaser or in blank by an effective endorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has “control” of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has “control” of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) has control, even if the registered owner in the case of subsection (c) or the entitlement holder in the case of subsection (d) retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subsection (c)(2) or (d)(2) without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 7; Laws, 2001, ch. 495, § 18, eff from and after Jan. 1, 2002.

Editor’s Note — A former § 75-8-106 [Codes, 1942, § 41A:8-106; Laws, 1966, ch. 316, § 8-106; 1990, ch 384, § 5, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, deleted “or” following “holder” in (d)(1); added (d)(3); substituted “subsection (c)” for “subsection (c)(2)” and “(d)” for “(d)(2)” throughout (f); and made minor punctuation changes throughout.

JUDICIAL DECISIONS

1. In general.

Under UCC § 8-106, New York court would apply New Jersey law with respect to questions concerning validity as securi-

ties of engravings in action arising out of theft of shipment of series of equipment trust certificate engravings from Kennedy International Airport and subsequent use

of engravings as collateral for loan obtained from plaintiff since defendant was organized under law of New Jersey. *Bankhaus Hermann Lampe KG v. Mercantile-Safe Deposit & Trust Co.*, 466 F. Supp. 1133 (S.D.N.Y. 1979).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law in Rhode Island, plaintiff alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent: (1) under UCC § 8-106 rights and duties of issuer with respect to such transfer were governed by law, including conflicts of laws rules, of jurisdiction of organization of issue, i.e., Rhode Island; (2) since Rhode Island conflicts of laws rules made Oklahoma statute of limitations applicable and since plaintiff's action to enforce liability of corporation for improper registration of her stock under UCC § 8-311 was not limited by any specific provision of Oklahoma statute of limitations, it was limited by general provision, providing five year limitation period for action not otherwise provided for in statute.

Reinhard v. Textron, Inc., 516 P.2d 1325 (Okla. 1973).

The proper construction of § 8-406 dictates that the obligations of a transfer agent are the same as that of the issuer, and the net effect of § 8-106 and § 8-406 is to establish that the issuer and any of its transfer agents have equal obligations to security holders, regardless of which state's law is applicable to the case. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

In *Welland Invest. Corp. v. First Nat Bank* (1963) 81 NJ Super 180, 195 A2d 210, 1 UCCRS 324, an action by an investment company to compel a transfer of certain stock and for damages against the issuer and transfer agent for wrongful refusal to transfer, both the investment company and the transfer agent conceded that the law of Delaware applied to the rights and duties of the issuer, a Delaware corporation, with respect to the registration and transfer of the stock in question. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 75.

18A Am. Jur. 2d, Corporations §§ 10, 24, 25.

CJS. 79A C.J.S., Securities Regulation, § 334.

§ 75-8-107. Whether indorsement, instruction, or entitlement order is effective.

(a) "Appropriate person" means:

(1) With respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) With respect to an instruction, the registered owner of an uncertificated security;

(3) With respect to an entitlement order, the entitlement holder;

(4) If the person designated in paragraph (1), (2), or (3) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

(5) If the person designated in paragraph (1), (2), or (3) lacks capacity, the designated person's guardian, conservator, or other similar representa-

tive who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) It is made by the appropriate person;

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under Section 75-8-106(c)(2) or (d)(2); or

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) The representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

SOURCES: Laws, 1996, ch. 468, § 8, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-107 [Codes, 1942, § 41A:8-107; Laws, 1966, ch. 316, § 8-107; 1990, ch. 384, § 6, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 104-106, 108, 115.

§ 75-8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

(1) The certificate is genuine and has not been materially altered;

(2) The transferor or indorser does not know of any fact that might impair the validity of the security;

(3) There is no adverse claim to the security;

(4) The transfer does not violate any restriction on transfer;

(5) If the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(6) The transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

(1) The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;

(2) The security is valid;

(3) There is no adverse claim to the security; and

(4) At the time the instruction is presented to the issuer:

(i) The purchaser will be entitled to the registration of transfer;

(ii) The transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;

(iii) The transfer will not violate any restriction on transfer; and

(iv) The requested transfer will otherwise be effective and rightful.

(c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:

(1) The uncertificated security is valid;

(2) There is no adverse claim to the security;

(3) The transfer does not violate any restriction on transfer; and

(4) The transfer is otherwise effective and rightful.

(d) A person who indorses a security certificate warrants to the issuer that:

(1) There is no adverse claim to the security; and

(2) The indorsement is effective.

(e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:

(1) The instruction is effective; and

(2) At the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.

(f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.

(g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has authority to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g).

(i) Except as otherwise provided in subsection (g), a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f). A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b), and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of the customer.

SOURCES: Laws, 1996, ch. 468, § 9, eff from and after July 1, 1996.

Editor's Note — Former § 75-89-108 [Laws, 1990, ch 384, § 7, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Varying effect of provisions of this code by agreement, see § 75-1-102(3).

Requisite indication of issuer's lien on security, see § 75-8-209.

Rights and title acquired by purchaser of security, see § 75-8-302.

Lost, destroyed, and stolen securities, see § 75-8-405.

JUDICIAL DECISIONS

1. In general.

Where (1) joint owner of bank certificates and shares of stock was deprived of his interest therein by other joint owner's forgery of first joint owner's signatures to documents transferring such securities to second joint owner, and (2) stockbroker for both joint owners guaranteed genuineness of first joint owner's signatures on transfer documents, stockbroker could not, by relying on UCC § 8-306 and § 8-315, recover damages from second joint owner for forgery of first joint owner's signatures on theory that such forgery caused broker to be liable to first joint owner. In such situation, UCC § 8-306, which relate to warranties and wrongful transfer, were inapplicable since stockbro-

ker, although possessing rights and privileges of purchaser under UCC § 8-306, was not purchaser for value to whom warranties of UCC § 8-306 run. *Roth v. Roth*, 571 S.W.2d 659, 5 A.L.R.4th 350 (Mo. Ct. App. 1978).

Bank which was bona fide purchaser of 16 stolen treasury bills did not, on transmitting such bills for value to plaintiff correspondent bank, breach any warranty created by UCC § 8-306, since (1) fact that transmitting bank was bona fide purchaser at time it purchased each stolen bill satisfied warranty to plaintiff of effective and rightful transfer; (2) evidence did not show any breach of warranty that bills were genuine and not altered; and (3) bank at time of transmitting bills to plain-

tiff had no knowledge of any facts that might impair their validity. *Morgan Guar. Trust Co. v. New England Merchants Nat'l Bank*, 438 F. Supp. 97 (D. Mass. 1977).

Ultimate transferee of restricted stock did not have standing to assert UCC § 8-306 breach of warranty claim against original transferor on basis of original transferor's omission of legend from stock certificates regarding restricted nature of stock, where ultimate transferee did not obtain stock as original transferor's immediate transferee. *Ford v. Cannon*, 413 F. Supp. 1393 (M.D. Fla. 1976).

In action arising out of payment for counterfeit United States treasury bill, intermediaries who were known by bank to be entrusted with delivery of bill on behalf of principal were not liable for breach of warranty of genuineness, since, under UCC § 8-306, they only warranted their own good faith and authority in transaction. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice un-

der UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Record did not support conclusion that bank which directed broker to sell stock pledged to it as collateral was mere intermediary and as such warranted only its good faith and authority. *First Nat'l Bank v. H. Hentz & Co.*, 498 S.W.2d 478 (Tex. Civ. App. 1973).

One who presents a security to the issuer for discharge warrants only that he is entitled to payment. *E.F. Hutton & Co. v. Manufacturers Nat'l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of corporate stock. 53 A.L.R.2d 1396.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 101-170.

15A Am. Jur. 2d, Commercial Code §§ 100-101.

18A Am. Jur. 2d, Corporations §§ 246, 251, 413, 469-471.

CJS. 18 C.J.S., Corporations § 143.

19 C.J.S., Corporations § 670.

§ 75-8-109. Warranties in indirect holding.

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) There is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in Section 75-8-108(a) or (b).

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the

owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in Section 75-8-108(a) or (b).

SOURCES: Laws, 1996, ch. 468, § 10, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-110. Applicability; choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

- (1) The validity of a security;
- (2) The rights and duties of the issuer with respect to registration of transfer;
- (3) The effectiveness of registration of transfer by the issuer;
- (4) Whether the issuer owes any duties to an adverse claimant to a security; and
- (5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e), governs:

- (1) Acquisition of a security entitlement from the securities intermediary;
- (2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;
- (3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and
- (4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5).

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

- (1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for the purposes of this part, this article or the Uniform Commercial Code, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the securities intermediary and its entitlement holder expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding paragraphs of this subsection apply, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding paragraphs of this subsection apply, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

SOURCES: Laws, 1996, ch. 468, § 11; Laws, 2001, ch. 495, § 19, eff from and after Jan. 1, 2002.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote (e).

Cross References — Territorial application of code and parties power to chose applicable law, see § 75-1-105.

Perfection of security interests in multiple state transactions, see §§ 75-9-301 et seq.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 75. **CJS.** 79A C.J.S., Securities Regulation § 352.

§ 75-8-111. Clearing corporation rules.

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this chapter and affects another party who does not consent to the rule.

SOURCES: Laws, 1996, ch. 468, § 12, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-112. Creditor's legal process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

SOURCES: Laws, 1996, ch. 468, § 13, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Injunctions, see §§ 11-13-1 et seq.

Attachment in chancery, see §§ 11-31-1 et seq.

Attachment at law, see §§ 11-33-1 et seq.

Executions generally, see §§ 13-3-1 et seq.

JUDICIAL DECISIONS

1. In general.

In action by Philippine citizens for fraud in connection with stock investment in realty development in Spain, in which action one codefendant counterclaimed for \$6,500,000 allegedly due on promissory notes issued by plaintiffs to pay for stock investment in suit, court held (1) that plaintiff held extensive assets in various securities outside United States; and (2) that counterclaiming defendant could not successfully base request for preliminary mandatory injunction against plaintiffs, which would direct them to transfer secu-

rities owned by them outside jurisdiction of New York state to New York state for attachment by sheriff, on UCC § 8-317 because (a) UCC § 8-317 does not change or eliminate well-established requirements for injunctive relief under New York law, and (b) New York requirements for injunctive relief include likelihood of ultimate success, irreparable injury, no adequate remedy at law, and balancing of equities, which requirements preclude issuance of injunction at creditor's mere request to compel assets outside jurisdiction of New York court to be brought

within court's jurisdiction for attachment. *Siy v. McMicking*, 134 Misc. 2d 164 (1986).

Under UCC § 8-317, providing that if a security registered to judgment debtor cannot readily be levied on by ordinary legal process, judgment creditor who seeks to reach such security may obtain assistance of court "by injunction or otherwise," judgment creditor could enjoin transfer by issuer corporation of judgment debtor's stock in such corporation in order to protect judgment creditor's ability to execute on judgment until sheriff could take physical possession of stock. *Dalton v. Meister*, 84 Wis. 2d 303, 267 N.W.2d 326 (1978).

In creditor's action for breach of indemnity agreement, prejudgment remedy of attachment of certain securities owned by debtor was authorized by UCC § 8-317(2), even though subsection (1) of UCC § 8-317 requires that there be actual physical possession and control of stock certificates by sheriff before attachment can be perfected. *Inter-Regional Fin. Group, Inc. v. Hashemi*, 562 F.2d 152 (2d Cir. Conn. 1977), cert. denied, 434 U.S. 1046, 98 S. Ct. 892, 54 L. Ed. 2d 798 (1978).

It was unnecessary for there to be actual seizure of stocks in corporations formed pursuant to Alaska Native Claims Settlement Act before they could be attached, as provided in UCC § 8-317, since stocks, by virtue of federal law, were totally inalienable and, thus, policy considerations underlying UCC § 8-317 were not applicable because there was no innocent purchaser to protect. *Calista Corp. v. DeYoung*, 562 P.2d 338 (Alaska 1977).

In action by judgment creditor to invoke UCC § 8-317 to enable creditor to subject to levy and sale by sheriff shares of stock owned by defendants in defendant corporation, judgment for plaintiff which ordered delivery of such stock to sheriff for sale was proper because (1) legislature by adopting UCC § 8-317 clearly intended to provide judgment creditor with method of reaching securities for purpose of subjecting them to levy, and (2) term "security" used in UCC § 8-317 includes common stock in a corporation, such as stock owned by defendants. *Grossman v. Glass*, 239 Ga. 319, 236 S.E.2d 657 (1977).

In proper case creditor of security owner may seek equitable aid of court of compe-

tent jurisdiction to gain control of security which cannot be readily attached by means of ordinary procedures provided for in law. *Fleming v. Gray Mfg. Co.*, 352 F. Supp. 724 (D. Conn. 1973).

Code § 8-317 providing that no levy upon outstanding security shall be valid until it is actually seized by officer was not enacted for purpose of determining what levy would suffice to entitle sheriff to poundage or to enforce money judgment against judgment debtor, but was intended to define rights of third parties claiming interest in attached personal property. *Knapp v. McFarland*, 462 F.2d 935, 18 A.L.R. Fed. 555 (2d Cir. N.Y. 1972).

The intent of the statute, providing that no levy upon an outstanding security is valid until it is actually seized by the officer, was not to determine what levy would suffice to entitle a sheriff to poundage or to enforce a money judgment against a judgment debtor but was rather enacted to protect bona fide purchasers for value of property subject to a judgment creditor's lien by invalidating a levy as to such parties unless the sheriff has taken actual possession. *Knapp v. McFarland*, 462 F.2d 935, 18 A.L.R. Fed. 555 (2d Cir. N.Y. 1972).

A levy by attachment against shares of stock is proper where directed against a bank holding the shares as custodian for the trustee of a voting trust to which the shares had been transferred, even though the voting trust agreement had been terminated by the time of the attachment. *Proteus Food & Indus., Inc. v. Nippon Reizo Kabushiki Kaish*, 4 U.C.C. Rep. Serv. 961 (1968, NY Sup).

The provisions of this section relating to attachment of securities are also applicable to evidences of indebtedness and certificates or instruments representing or securing an interest in the capital assets or property of any company, and certificates of indebtedness and evidences of ownership insofar as they represent interests in capital assets must, to be effectively attached, be actually seized, and although an attempted attachment execution on corporate stock was invalid because it was not actually seized, the attachment execution is not to be dissolved where it does not appear of record that the

only property of the debtor in the hands of the garnishee comprises shares of stock. *DeShong v. Cody*, 36 Pa. D. & C.2d 109 (1964).

A federal district court in Pennsylvania had no jurisdiction under this section to compel a holding company sued on two promissory notes to bring to the district

and deliver to the United States Marshal the capital stock of its four subsidiaries, in order that they might be made subject to foreign attachment, where none of the stock certificates was then or ever had been in Pennsylvania. *Nederlandsche Handel-Maatschappij, N.V. v. Sentry Corp.*, 163 F. Supp. 800 (E.D. Pa. 1958).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 41, 43, 44, 341, 580.

15A Am. Jur. 2d, Commercial Code § 92.

18A Am. Jur. 2d, Corporations §§ 490-502.

30 Am. Jur. 2d, Executions §§ 162, 163, 249, 250, 668.

Judicial proceedings involving securities; to obtain possession, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:91, 8:92.

CJS. 18 C.J.S., Corporations §§ 272-274.

§ 75-8-113. Statute of frauds inapplicable.

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making.

SOURCES: Laws, 1996, ch. 468, § 14, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Statute of frauds, generally, see § 75-1-206.

§ 75-8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

SOURCES: Laws, 1996, ch. 468, § 15, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Negotiability of bonds issued by the Municipal Gas Authority of Mississippi, see § 77-6-31.

Inapplicability of provisions of code respecting commercial paper to investment securities, see § 75-3-103.

Burden of establishing signatures, defenses and due course, see § 75-3-307.

Issuer's responsibility and defenses, see § 75-8-202.

Rights and title acquired by purchaser of security, see § 75-8-301.

Effect of delivery without, and right to compel, endorsement, see § 75-8-307.

JUDICIAL DECISIONS

1. In general.

The Uniform Commercial Code, under UCC § 8-105(1), treats investment securities as negotiable instruments. The code also, in UCC § 1-201(20), defines a "holder" as one who is "in possession" of an investment security that is drawn, issued, or indorsed to him or to his order, or to bearer or in blank. Under the code's definition of a holder, therefore, possession is a significant factor, and the possessor of an instrument is a "holder" without regard to the legality or propriety of his possession. *Stewart Becker, Ltd. v. Horowitz*, 94 Misc. 2d 766 (1978).

Under UCC § 8-105(2)(c), holders of debentures indorsed in blank, as to which signatures were admitted, were entitled on production of debentures to recover from bank that had issued them and defaulted in payment of interest thereon in absence of any defense to recovery by bank. In such case, bank's right of setoff, based on separate and distinct obligations of persons to whom debentures were originally issued and who had negotiated debentures to plaintiff holders, did not constitute "defense" within meaning of UCC § 8-105(2)(c). *E.H. Hinds, Inc. v. Coolidge Bank & Trust Co.*, 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on

owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action seeking replacement from corporations of securities as to which defendants had allegedly improperly registered transfers on forged indorsements: (1) trial court erred in applying provisions of UCC § 8-105(2)(b), that signatures on securities were "presumed to be genuine or authorized", where evidence was overwhelming that signatures were forged in furtherance of scheme by third parties, who had stolen certificates, to negotiate stock to others; (2) trial court also erred in finding that plaintiff were "otherwise precluded" under UCC § 8-311, from asserting an effectiveness of transfers where, other than separate finding that plaintiffs were precluded from recovery by unreasonable delay in notifying issuers, record contained no evidence of conduct by the plaintiffs that would preclude recovery; (3) trial court's findings were inadequate on issue whether plaintiffs had notified issuers as to missing securities "within a reasonable time", as required by UCC § 8-405, after they had noticed certificates were missing, where, though evidence amply supported court's finding as to date plaintiffs had notice of loss, it did not support further findings that letter sent to defendants some 41 days later was

insufficient to notify them of loss, and that more than another month elapsed before adequate notice was given, and where court made no finding as to whether 41-day delay was unreasonable. *Ibanez v. Farmers Underwriters Ass'n*, 14 Cal. 3d 390, 534 P.2d 1336 (1975).

Stock certificates issued in bearer form were "securities," as defined in UCC § 8-102, and negotiable instruments under UCC § 8-105; thus, where there was evidence showing agreement of joint ownership with survivorship between decedent and her brother, where brother always had possession of one certificate and other certificate was delivered by decedent to her brother prior to her death, and where there was no evidence that delivery was

procured by fraud or duress, brother had lawful possession of and owned stock certificates. *Eastman v. Mendrick*, 218 Kan. 78, 542 P.2d 347 (1975).

Under UCC § 8-105, as amended, in a silent record case, the holder of a security must affirmatively demonstrate that he is a bona fide purchaser within the UCC § 8-302 definition. *Young v. Kaye*, 443 Pa. 335, 279 A.2d 759, 1971.

Where the issuer has not questioned the signatures of the assignor on stock certificates or raised any question as to their validity, the holder of the securities has a prima facie right of action thereon. *Perugino v. Samson Land & Dev. Co.*, 39 Pa. D. & C.2d 500 (1965).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bonds §§ 51, 55, 63.

15A Am. Jur. 2d, Commercial Code §§ 73, 74.

18 Am. Jur. 2d, Corporations § 18.

Instructions to jury; effect of unautho-

rized signature on issue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations § 142.

19 C.J.S., Corporations §§ 664 et seq.

§ 75-8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) Took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) In the case of a security certificate that has been stolen, acted with notice of the adverse claim.

SOURCES: Laws, 1996, ch. 468, § 16, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Contractual obligation of good faith, see § 75-1-203.

Course of dealing and usage of trade, see § 75-1-205.

Similar provision respecting documents of title, see § 75-7-404.

Secured party's right to dispose of collateral after default, see § 75-9-601.

Embezzlement by conversion, see §§ 97-23-19—97-23-21.

JUDICIAL DECISIONS

1. In general.

While providing a remedy for the owners of misappropriated securities in UCC § 8-315, the Uniform Commercial Code does not foreclose recourse to an action at law for conversion (see Official Comment 2 to UCC § 8-315). However, the code has codified, in UCC §§ 8-301 and 8-302, the common-law protection extended to bona fide purchasers and has also extended, in UCC § 8-318, protection to agents who formerly went unprotected in many jurisdictions, even though they acted in good faith. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Where the agent is in the business of buying, selling, or otherwise dealing with securities, "good faith" is expressly defined by UCC § 8-318 as including the "observance of reasonable commercial standards." *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Although UCC § 8-318 purports to protect broker who transfers securities at insistence of principal who has no right to dispose of them, protection of UCC § 8-318 is only available as defense, and broker has burden of presenting evidence to show that it acted in good faith and in accordance with reasonable commercial standards in making such transfer. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Where stock in custodial account established for minor's benefit was, after minor attained his majority, wrongfully indorsed by minor's father as alleged custodian and reissued by issuing companies on father's request, and where father as alleged custodian then opened account with defendant broker and used account for trading purposes with disastrous results to value of principal, in beneficiary's action against broker for value of stock, broker's contention that under UCC § 8-318 it was not liable for selling or otherwise dealing in such stock in good faith precluded summary judgment in favor of beneficiary,

since issue as to broker's observance of reasonable commercial standards in dealing in such stock could not, on record involved in case, be decided on motion for summary judgment. *Harris, Upham & Co. v. Harris*, 142 Ga. App. 696, 236 S.E.2d 773 (1977).

In conversion action against bank which sold stolen treasury notes on behalf of its customer, bank acted in good faith and observed reasonable commercial standards pursuant to UCC § 8-318 in selling notes where, inter alia, bank had prior dealings with customer, nothing was suspect about customer's credentials, withdrawal by customer of large amount of cash from checking account which paid no interest was reasonable, transactions were in progress for more than one month without bank receiving any report that notes were missing or stolen, inquiries by bank addressed to appropriate federal agencies did not reveal that any of the notes were stolen or missing, customer did not disappear when funds were placed in suspense account, customer made personal daily visits to bank, and customer retained counsel to press his claim. *United States Fid. & Guar. Co. v. Royal Nat'l Bank*, 545 F.2d 1330 (2d Cir. N.Y. 1976).

In action against stockbroker for having sold stock held as community property on instructions of plaintiff's former husband and delivered proceeds to him in treasury bills, treasury bills met all requirements of securities under UCC §§ 8-102(1)(a) and 8-318, negating liability of broker for conversion in sale of securities according to instructions of principal; immunization from liability extended to delivery of proceeds to principal authorizing sale so long as good faith existed on part of broker. *Martinez v. Dempsey-Tegeler & Co.*, 37 Cal. App. 3d 509 (2d Dist. 1974).

Section referred to as example of explicit requirement that party exercise more than "honesty in fact." Industrial

Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

It would seem that a rule of the New York Stock Exchange requiring the broker to use due diligence to learn the essential facts relative to its customers formulates what are "reasonable commercial standards." Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

The Uniform Commercial Code, which apparently modifies the law in this state somewhat in favor of the selling broker, provides that the test of good faith of selling broker includes "observance of regional commercial standards if he be in the business of buying, selling, or otherwise dealing with securities". Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency § 308.
12 Am. Jur. 2d, Brokers §§ 163, 170, 171, 173.
18 Am. Jur. 2d, Conversion §§ 33, 50.

Delivery to purchaser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:81.

CJS. 18 C.J.S., Corporations § 263.

§ 75-8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 17, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

PART 2.

ISSUE AND ISSUER.

SEC.

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| 75-8-201. | Issuer. |
| 75-8-202. | Issuer's responsibility and defenses; notice of defect or defense. |
| 75-8-203. | Staleness as notice of defect or defense. |
| 75-8-204. | Effect of issuer's restriction on transfer. |
| 75-8-205. | Effect of unauthorized signature on security certificate. |
| 75-8-206. | Completion or alteration of security certificate. |
| 75-8-207. | Rights and duties of issuer with respect to registered owners. |
| 75-8-208. | Effect of signature of authenticating trustee, registrar, or transfer agent. |
| 75-8-209. | Issuer's lien. |
| 75-8-210. | Overissue. |

§ 75-8-201. **Issuer.**

(a) With respect to an obligation on or a defense to a security, an “issuer” includes a person that:

(1) Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) Becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

SOURCES: Laws, 1996, ch. 468 § 18, eff from and after July 1, 1996.

Editor’s Note — Former § 75-8-201 [Codes, 1942, § 41A:8-201; Laws, 1966, ch. 316, § 8-201; 1990, ch 384, § 8, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — Responsibility and defenses of issuer, see § 75-8-202.

Registration of security transfers, see §§ 75-8-401 et seq.

Mississippi Securities Act, generally, see §§ 75-71-101 et seq.

Small business investment companies, see §§ 79-7-1 to 79-7-7.

Investment trusts, see §§ 79-15-1 et seq.

Fiduciary security transfers, see §§ 91-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple

purchaser. *E.F. Hutton & Co. v. Manufacturers Nat’l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

RESEARCH REFERENCES

ALR. Statutory requirements respecting issuance of corporate stock as applicable to foreign corporations. 8 A.L.R.2d 1185.

Am Jur. 15A Am Jur 2d, Commercial Code §§ 76, 79, 80, 83-85.

18 Am Jur 2d, Corporations §§ 21, 245, 246, 681 et seq.

Instruction to jury; effect of unauthorized signature on issue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations §§ 217 et
seq.
19 C.J.S., Corporations §§ 664 et seq.

§ 75-8-202. Issuer's responsibility and defenses; notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in Section 75-8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

SOURCES: Laws, 1996, ch. 486, § 19, eff from and after July 1, 1996.

Editor's Note — Former § [Codes, 1942, § 41A:8-202; Laws, 1966, ch. 316, § 8-202; 1990, ch. 384, § 9, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Time of notice of adverse claims, see § 75-8-105.

Time when notice of defect or defense chargeable to purchaser of security, see § 75-8-203.

Completion or alteration of security, see § 75-8-206.

Lien on security in favor of issuer, see § 75-8-209.

Overissue of securities, see § 75-8-210.

JUDICIAL DECISIONS

1. In general.

Payment under junior debentures need not be made where title to securities recited that it was "Convertible Subordinated Debenture" with further specific caveat of subordination to senior indebtedness, as set forth in indenture, and where senior debentures were in default. *Kurtz v. American Export Indus., Inc.*, 49 A.D.2d 557 (1st Dep't 1975), aff'd, 39 N.Y.2d 738, 384 N.Y.S.2d 774, 349 N.E.2d 874 (1976), motion denied, 39 N.Y.2d 739, 384 N.Y.S.2d 774, 349 N.E.2d 875 (1976).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which

its transferor had. *Dean Witter & Co. v. Educational Computer Corp.*, 369 F. Supp. 757 (E.D. Pa. 1974) (applying Pennsylvania law).

A restriction on the alienation of stock imposed by an amendment to the corporate charter adopted prior to the passage of the Delaware statute which limits the power of corporations to restrict the alienability of their stock was, nevertheless, ineffective against the plaintiff who had acquired previously issued shares at the time when no restrictions as to their sale were in force. With respect to the pre-statutory amendment, upholding the restriction would contravene policy provisions that restraints are generally disfavored and are to be permitted only so long as they reasonably relate to a valid corporate purpose. The post-statute restriction was likewise unenforceable where the shareholder was not a party to the agreement of restriction and did not vote in favor of it. *B & H Whse., Inc. v. Atlas Van Lines*, 490 F.2d 818 (5th Cir. Tex. 1974).

In stockholder's derivative claim, neither evidence nor pleadings established which parties were present owners of outstanding stock which assertedly ought to be cancelled or redeemed, and therefore cancellation was not appropriate in light of UCC § 8-202 concerning rights of pur-

chasers for value and without notice.
Eastern Oklahoma Tel. Co. v. Ameco, Inc.,
 437 F.2d 138 (10th Cir. Okla. 1971).

RESEARCH REFERENCES

ALR. Rights, duties, and liability of corporation in connection with transfer of stock of infants or incompetent. 3 A.L.R.2d 881.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Patent rights, copyrights, trademarks, secret processes, and the like, as “property” within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received. 37 A.L.R.2d 913.

Am Jur. 12 Am. Jur. 2d, Bonds § 55.

15A Am. Jur. 2d, Commercial Code §§ 78-80.

18 Am. Jur. 2d, Corporations §§ 488, 509, 512, 709 et seq.

Answer; defense; material change in character of security issued, 6 Am. Jur. Pl & Pr Forms (Rev) Investment Securities, Form 8:21.

Effect of bona fide purchase and re-registration of security, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

CJS. 18 C.J.S., Corporations §§ 217 et seq., 283.

19 C.J.S., Corporations §§ 664 et seq.

§ 75-8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one (1) year after that date; or

(2) Is not covered by paragraph (1) and the purchaser takes the security more than two (2) years after the date set for surrender or presentation or the date on which performance became due.

SOURCES: Laws, 1996, ch. 486, § 20, eff from and after July 1, 1996.

Editor’s Note — Former § 75-8-203 [Codes, 1942, § 41A:8-203; Laws, 1966, ch. 316, § 8-203; 1990, ch. 384, § 10, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — Staleness of notice of adverse claims, see § 75-8-105.

Purchaser’s notice of defects or defense, see § 75-8-202.

Overissue of security, see § 75-8-210.

RESEARCH REFERENCES

ALR. Validity, construction and effect of provisions of article of incorporation of stock certificates relating to call, redemption, or retirement of common stock. 48 A.L.R.2d 392.

Redemption or retirement of preferred stock. 46 A.L.R.3d 7.

Am Jur. 12 Am. Jur. 2d, Bonds § 33.

15A Am. Jur. 2d, Commercial Code § 82;

18A Am. Jur. 2d, Corporations §§ 509, 541 et seq.

"Notice and "knowledge" of a defect defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

CJS. 18 C.J.S., Corporations § 143.

19 C.J.S., Corporations § 693.

§ 75-8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

- (1) The security is certificated and the restriction is noted conspicuously on the security certificate; or
- (2) The security is uncertificated and the registered owner has been notified of the restriction.

SOURCES: Laws, 1996, ch. 486, § 21, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-204 [Codes, 1942, § 41A:8-204; Laws, 1966, ch. 316, § 8-204; 1990, ch. 384, § 11, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — What constitutes "issuer," see § 75-8-201.

Requisite to validity of issuer's lien on security, see § 75-8-209.

Registration of securities transfers, see §§ 75-8-401 et seq.

Liability of issuer registering transfer of security on unauthorized endorsement, see § 75-8-404.

JUDICIAL DECISIONS

1. In general.

The phrase "transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed," which was printed on a stock certificate as part of the common format, did not render a transfer invalid. *Burns v. Burns*, 789 So. 2d 94 (Miss. Ct. App. 2000).

A restriction contained in a certificate of incorporation requiring that the shares of stock, before being sold to anyone, be first offered for sale proportionately to the other holders of shares of stock in the corporation, is a valid and reasonable restriction binding the stockholders (Uni-

form Commercial Code, § 8-204) and therefore takes precedence and controls over the provisions in testator's will directing the executor to offer 25% of his shares for sale to a nonstockholder. A provision according the corporation a right or first option to purchase the stock is valid and enforceable provided the restraint on alienation of stock effectuates a lawful purpose and is in accord with public policy. *In re Estate of Hatfield*, 93 Misc. 2d 472 (1978).

Failure to note on certificates restrictive provisions of corporation's articles of incorporation, was not bar to enforcement against person who had actual notice of

them. *Irwin v. West End Dev. Co.*, 481 F.2d 34 (10th Cir. Colo. 1973), cert. denied, 414 U.S. 1158, 94 S. Ct. 915, 39 L. Ed. 2d 110 (1974) (applying Colorado law).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. *Dean Witter & Co. v. Educational Computer Corp.*, 369 F. Supp. 757 (E.D. Pa. 1974) (applying Pennsylvania law).

In action to compel corporation to transfer upon its books stock certificate given by plaintiff's former husband to plaintiff's minor child, corporation and its officers were entitled to attempt to prove plaintiff's knowledge of stock transfer restriction and effect, if any, of her knowledge upon rights of child. *McLeod v. Sandy Island Corp.*, 260 S.C. 209, 195 S.E.2d 178 (1973).

Although line of print on face of stock certificate referring to transfer restric-

tions printed on back of certificate did not stand out and could not be considered conspicuous, assignee of certificate was not entitled to summary judgment where record did not establish conclusively that assignee lacked knowledge of restriction as provided for in § 8-204. *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 53 A.L.R.3d 1265 (Tex. 1972).

A transferee is not bound by an unknown restriction which does not appear on the stock certificate. *First Nat'l City Bank v. Donbar Dev. Corp.*, 4 U.C.C. Rep. Serv. 1070 (N.Y. App. Term 1968).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder, such a restriction is ineffective to support the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. *Perugino v. Samson Land & Dev. Co.*, 39 Pa. D. & C.2d 500 (1965).

In a case where restrictions on transfer of stock in a corporation were contained in the articles of organization, but in which it did not appear that such restrictions were noted on any certificates or that the persons to whom certificates were issued ever saw any certificates except those issued to them, which did not contain the restrictions, it was said that it would appear that the instant section was applicable in the premises. *Callahan v. Callahan*, 345 Mass. 244, 186 N.E.2d 823 (1962).

RESEARCH REFERENCES

ALR. Provision for disposal of stock on death of shareholder as affecting validity of option or similar contract. 1 A.L.R.2d 1269.

Construction and application of provision restricting sale or transfer of corporate stock. 2 A.L.R.2d 745.

Construction and effect of § of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate. 29 A.L.R.2d 901.

Dominant shareholders' accountability to minority for profit, bonus, or the like received on sale of stock to outsiders. 50 A.L.R.2d 1146.

Validity on restriction on alienation or transfer of corporate stock. 61 A.L.R.2d 1318.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 87.

18A Am. Jur. 2d, Corporations §§ 683 et seq.

“Notice” and “knowledge” of a fact defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

Restrictions on transfer of shares, 19 Am. Jur. Legal Forms 2d, Uniform Com-

mercial Code: Article 8 — Investment Securities, §§ 253:2811 et seq.

CJS. 18 C.J.S., Corporations §§ 217-225.

19 C.J.S., Corporations §§ 664 et seq.

§ 75-8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) An employee of the issuer, or of any of the persons listed in paragraph (1), entrusted with responsible handling of the security certificate.

SOURCES: Laws, 1996, ch. 486, § 22, eff from and after July 1, 1996.

Editor’s Note — Former § 75-8-205 [Codes, 1942, § 41A:8-205; Laws, 1966, ch. 316, § 8-205; 1990, ch 384, § 12, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — This section being exception to lack of genuineness of security as defense, see § 75-8-202.

JUDICIAL DECISIONS

1. In general.

In action arising when vice-president of defendant bank who was authorized to sign bank’s serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained \$20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-

201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. *Victory Nat’l Bank v. Oklahoma State Bank*, 520 P.2d 675 (Okla. 1973).

In a diversity action by a surety to recover funds paid out by it under a bond, it was held that the defendant employer corporation was not liable under UCC where an employee, entrusted with the responsibility of handling securities, caused unauthorized issuance of corporate stock and made several unauthorized entries on defendant’s transfer books for his own independent purpose and not for

the benefit of the defendant. *Hartford Accident & Indem. Co. v. Lisky*, 323 F. Supp. 103 (N.D. Ill. 1971).

Certificates in question, which have been admittedly issued without authority and are not manually signed, are nonetheless genuine. Stated differently, this means that the statutory requirement of a transfer agent's counter signature on stock certificates bearing facsimile signatures does not create an invalidity which precludes bona fide purchase. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293

F. Supp. 1383 (D. Colo. 1968).

Where church was careless in entrusting its treasurer's facsimile signature to fiscal agent and in failing to take precaution of requiring authentication of bonds by manual signature, church was liable to those who, in ordinary course of business, had purchased duplicate bonds printed fraudulently and without authority by fiscal agent. *First Am. Nat'l Bank v. Christian Found. Life Ins. Co.*, 242 Ark. 678', 420 S.W.2d 912 (1967).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 78-80, 83, 84.

18 Am. Jur. 2d, Corporations §§ 681, 709 et seq.

Effect of overissue, 6 Am. Jur. Pl & Pr

Forms (Rev), Investment Securities, Form 8:11 Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations § 143.

19 C.J.S., Corporations § 667.

§ 75-8-206. Completion or alteration of security certificate.

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) Any person may complete it by filling in the blanks as authorized; and

(2) Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

SOURCES: Laws, 1996, ch. 486, § 23, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-206 [Codes, 1942, § 41A:8-206; Laws, 1966, ch. 316, § 8-206; 1990, ch. 384, § 13, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Unavailability of defenses of nondelivery and conditional delivery, see § 75-8-202.

Effect of unauthorized signature placed on security prior to, or in course of, issue, see § 75-8-205.

Overissue of securities, see § 75-8-210.

Rights acquired by purchaser, see § 75-8-302.

Delivery of security without endorsement, see § 75-8-304(d).

Manner of endorsing security, see § 75-8-304.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments § 28.

15A Am. Jur. 2d, Commercial Code §§ 84, 85.

18 Am. Jur. 2d, Corporations §§ 512-515.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:51-8:57.

1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proof of alteration of instrument).

5 Am. Jur. Proof of Facts, Fraud, Proof No. 1 (proof of fraud).

CJS. 3A C.J.S., Alteration of Instruments §§ 7 et seq.

18 C.J.S., Corporations § 141.

19 C.J.S., Corporations §§ 660-663.

§ 75-8-207. Rights and duties of issuer with respect to registered owners.

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This chapter does not affect the liability of the registered owner of a security for a call, assessment, or the like.

SOURCES: Laws, 1996, ch. 486, § 24, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-207 [Codes, 1942, § 41A:8-207; Laws, 1966, ch. 316, § 8-207; 1990, ch. 384, § 14, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Registration of securities transfers, see §§ 75-8-401 et seq.

Rights, privileges, and duties of authenticating trustee, transfer agent, or registrar, see § 75-8-407.

Effect of notice to authenticating trustee, transfer agent, or registrar, see § 75-8-407.

JUDICIAL DECISIONS

1. In general.

Under UCC § 8-207, issuing corporation has right to treat registered owner of security as person exclusively entitled to vote, receive notifications, and otherwise exercise rights and powers of owner prior to due presentment of security in registered form for registration of transfer of ownership. *Wanland v. C.E. Thompson Co.*, 64 Ill. App. 3d 46, 380 N.E.2d 1012 (1st Dist. 1978).

Since under UCC § 8-207, issuer of stock is permitted to treat registered owner as person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers

of an owner until the stock or other certificate is duly presented for registration of transfer, the transfer of record ownership of stock not only is necessary to effectuate or render complete the transfer of title to the stock but actually passes the "legal title" to the stock, making a stock transfer tax payable. *Monarch Life Ins. Co. v. State Tax Comm'n*, 39 A.D.2d 31 (3d Dep't 1972), *aff'd*, 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684 (1973).

The fact that, at the time of death, stock is registered in the name of the decedent and was, concededly, possessed by him three days prior to his death gives rise to a presumption, rebuttable in nature, that

the ownership of the stock was in the decedent. *In re Donsavage Estate*, 420 Pa. 587, 218 A.2d 112 (1966).

The corporation which issued stock certificates, until due presentment for registration of the transfer of such securities in

registered form, may treat the person whose name is registered on the stock as entitled to exercise all the rights and powers of the owner insofar as the corporation is concerned. *In re Donsavage Estate*, 420 Pa. 587, 218 A.2d 112 (1966).

RESEARCH REFERENCES

ALR. Enforcement of stock subscriptions after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Action for dividends after refusal of corporation or its agents to register or effectuate transfer of stock. 22 A.L.R.2d 168.

Patent rights, copyrights, trademarks, secret processes, and the like, as “property” within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received. 37 A.L.R.2d 913.

Transfer of stock of deceased owner to

permit personal representative to vote. 7 A.L.R.3d 638.

Construction and effect of UCC § 8-207(1) allowing issuer of investment security to treat registered owner as entitled to owner’s rights until presentment for registration of transfer. 21 A.L.R.4th 879.

Am Jur. 19 Am. Jur. 2d, Corporations §§ 1026-1032, 1236.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121-8:126.

CJS. 18 C.J.S., Corporations §§ 229, 283.

§ 75-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) The certificate is genuine;

(2) The person’s own participation in the issue of the security is within the person’s capacity and within the scope of the authority received by the person from the issuer; and

(3) The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) does not assume responsibility for the validity of the security in other respects.

SOURCES: Laws, 1996, ch. 486, § 25, eff from and after July 1, 1996.

Editor’s Note — Former § 75-8-208 [Codes, 1942, § 41A:8-208; Laws, 1966, ch. 316, § 8-208; 1990, ch 384, § 15, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — Effect of unauthorized signature of authenticating trustee, registrar, or transfer agent, see § 75-8-205.

Duty of authenticating trustee, registrar, or transfer agent, see § 75-8-407.

JUDICIAL DECISIONS

1. In general.

This section is a restatement of the prevailing case law as to the effect of the signature of an authenticating trustee.

Montague v. Farmers Nat'l Bank, 3 Pa. D. & C.2d 462 (1955), rev'd on other grounds, 180 Pa. Super. 610, 121 A.2d 597 (1956).

RESEARCH REFERENCES

Am Jur. 15 Am. Jur. 2d, Commercial Code §§ 69, 70, 71, 77, 78.

18A Am. Jur. 2d, Corporations §§ 246, 327, 329, 373, 413, 452, 457 et seq., 470, 473, 474.

Unauthorized indorsement, 6 Am. Jur.

Pl & Pr Forms (Rev), Investment Securities, Forms 8:51-8:57.

CJS. 18 C.J.S., Corporations §§ 143, 283, 257, 441-444.

19 C.J.S., Corporations §§ 670 et seq.

§ 75-8-209. Issuer's lien.

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

SOURCES: Laws, 1996, ch. 486, § 26, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effectiveness of issuer's restrictions on transfer, see § 75-8-204.

Liens, generally, see §§ 85-7-1 et seq.

RESEARCH REFERENCES

ALR. Construction and application of provisions of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock; payment of indebtedness to corporations. 2 A.L.R.2d 760.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate. 29 A.L.R.2d 901.

Validity of restrictions on alienation of corporate stock. 61 A.L.R.2d 1318.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 76, 83, 87, 88.

18 Am. Jur. 2d, Corporations §§ 186, 205 et seq.

Lien of issuer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8-Investment Securities, §§ 253:2791 et seq.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2801 to 253:2803 (investment securities: reservation of lien).

§ 75-8-210. Overissue.

(a) In this section, "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.

(b) Except as otherwise provided in subsections (c) and (d), the provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

SOURCES: Laws, 1996, ch. 486, § 27, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Defenses of issuer, see § 75-8-202.

Effect of unauthorized signature prior to, or in course of, issue of security, see § 75-8-205.

Completion or alteration of security, see § 75-8-206.

Warranty resulting from signature or authenticating trustee, registrar, or transfer agent, see § 75-8-208.

Registration of securities, see §§ 75-8-401 et seq.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 73, 76, 82, 83, 89, 119, 121. 18 Am. Jur. 2d, Corporations §§ 297, 306, 307, 313-315, 470, 473, 474.	securities: notice of overissue of securities and demand for similar securities or refund).
Effect of overissue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:11.	Effect of overissue, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2801, 253:2802.
19 Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2788 (investment	CJS. 18 C.J.S., Corporations § 142. 19 C.J.S., Corporations §§ 664 et seq.

PART 3.

TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES.

SEC.	
75-8-301.	Delivery.
75-8-302.	Rights of purchaser.
75-8-303.	Protected purchaser.
75-8-304.	Indorsement.
75-8-305.	Instruction.
75-8-306.	Effect of guaranteeing signature, indorsement, or instruction.
75-8-307.	Purchaser's right to requisites for registration of transfer.
75-8-308 through 75-8-321.	Repealed.

§ 75-8-301. **Delivery.**

(a) Delivery of a certificated security to a purchaser occurs when:

- (1) The purchaser acquires possession of the security certificate;
- (2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially endorsed to the purchaser by an effective endorsement and has not been endorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

SOURCES: Laws, 1996, ch. 468 § 28; Laws, 2001, ch. 495, § 20, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-301 [Codes, 1942, § 41A:8-301; Laws, 1966, ch. 316, § 8-301; 1990, ch 384, § 16, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote (a)(3).

Cross References — Notice to purchaser of adverse claims, see 75-8-105.

Right to compel issuer to deliver identical security not constituting overissue, see § 75-8-210.

Rights and title acquired by purchaser on delivery, see § 75-8-302.

Necessity for delivery in order for endorsement of security to constitute transfer, see § 75-8-304.

Effect of unauthorized endorsement, see § 75-8-404.

JUDICIAL DECISIONS

1. In general; transfer and possession.
2. Delivery to third person.
3. Effect of delivery.
4. Effect of endorsement.

1. In general; transfer and possession.

Under statute defining "possession", the meaning of the term would be strained by a holding that possession of certain shares of stock passed where the shares allegedly

possessed are not even in existence. *Kaufman v. Diversified Indus., Inc.*, 460 F.2d 1331 (2d Cir. N.Y. 1972), cert. denied, 409 U.S. 1038, 93 S. Ct. 517, 34 L. Ed. 2d 487 (1972), on remand, 356 F. Supp. 827 (S.D.N.Y. 1973).

Trial court erred in finding that there was no valid transfer of corporate stock from share holder to his sons where testimony at trial supported conclusion that

valid transfer took place and where plaintiffs did not challenge fact that father gave sons stock certificates, but only claimed that his action did not constitute delivery; fact that father had access to vault where certificates were kept after transfer did preclude effective transfer between parties to transaction. *Brener v. Industrial Steel Container Co.*, 303 Minn. 275, 228 N.W.2d 115 (1975).

2. Delivery to third person.

Where prospective purchaser of corporate stock executed promissory note for agreed price and his note together with share certificates were placed in possession of third party for safekeeping under agreement that certificates, already made out in prospective purchaser's name, would be delivered to him when note was paid, there was no evidence that prospective purchaser received any rights in stock which was alleged to have served as collateral, since there was no evidence of delivery to prospective purchaser or his agent and the fact that stock was issued in his name was insufficient to establish delivery. *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 518 P.2d 1097 (1974).

3. Effect of delivery.

Creditor who loaned money to debtor to purchase stock in exchange for security interest in stock did not have perfected, secured interest in stock, where stock certificate was not issued to creditor until after bankruptcy filing. *Williams v. Indibel, Inc.*, 167 B.R. 77 (Bankr. N.D. Miss. 1994).

Where (1) municipal bond dealer, prior to filing against it of involuntary petition in bankruptcy, (a) sold certain bonds to customer, (b) sent customer's nominee confirmation tickets concerning such sale, and (c) sent properly completed confirmation and delivery tickets concerning sale to defendant municipal-bond clearing facility in order to effectuate delivery of bonds to dealer's customer, and where (2) defendant clearing facility physically allocated specific bond certificates corresponding to dealer's instructions and recorded explicitly identifying information on bonds' delivery forms (including certificate numbers and name of dealer's customer), activities of dealer and defendant

clearing facility constituted sufficient identification, "by book entry or otherwise," of bonds sold to customer under UCC § 8-313, and dealer, by virtue of its contractual relationship with clearing facility, was not required by UCC § 8-313 to have actual physical possession of certificates. *Matthysse v. Securities Processing Servs., Inc.*, 444 F. Supp. 1009 (S.D.N.Y. 1977).

Where defendant made telephone call from Arizona to prospective purchaser in Texas, offering to sell and soliciting subscriptions for certain securities, telephone negotiations between defendant and purchaser amounted to an "offer" to person within state of Texas and fact that sale was to be finalized in Arizona was immaterial; criminal liability attached when defendant commenced dealing in securities within state of Texas, regardless of where commercial technicality of "delivery" was effectuated under UCC. *Shappley v. State*, 520 S.W.2d 766 (Tenn. Crim. App. 1974).

Stockbroker's claim for damages for conversion of corporate bond was properly denied, and its contractual claims properly held to be satisfied by return of appreciated bond and accumulated dividends where original transfer and delivery to customer was voluntary and made in normal course of business; customer became owner of bond upon its delivery to him and, from that point forward, broker had its remedy in action for price. *Hayden Stone, Inc. v. Brode*, 508 F.2d 895 (7th Cir. Ill. 1974).

4. Effect of endorsement.

When aunt caused stock to be issued in joint names with nephew and niece, respectively, and when delivery of new certificates was made to aunt, requirements of UCC § 8-309, stating that endorsement does not constitute transfer until delivery of security, and § 8-313, stating that delivery to purchaser occurs when he or persons designated by him acquires possession, were met notwithstanding physical delivery of stock certificates was not made to nephew or niece. *Robison v. Fickle*, 167 Ind. App. 651, 340 N.E.2d 824 (1976).

Under UCC § 8-301, title to stock passed to corporation where transferor

endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued \$5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had

cause of action to recover outstanding balance of purchase price or actual value of stock. *Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 187 U.S.P.Q. 291 (S.D.N.Y. 1975).

Where husband physically delivered stock certificate to wife with intention of making gift, transfer was complete even though certificate was not endorsed. *Rogers v. Rogers*, 271 Md. 603, 319 A.2d 119 (1974).

Where the original indorsement in blank of stock certificates was properly made, and the transferee holds the certificate in his possession, it is obvious that a delivery has taken place. *Morrison v. Liberty Dist. & Sav. Bank*, 61 Lack. Jur. 37 (Pa. 1960).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Brokers § 170.
15A Am. Jur. 2d, Commercial Code § 108.

18 Am. Jur. 2d, Corporations §§ 289, 461, 472.

Purchase; fraudulent actions by customer, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:31-8:33.

Delivery to purchaser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:81.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121, 8:124, 8:126.

CJS. 18 C.J.S., Corporations §§ 226 et seq.

§ 75-8-302. Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

SOURCES: Laws, 1996, ch. 468 § 29; Laws, 2001, ch. 495, § 21, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-302 [Codes, 1942, § 41A:8-302; Laws, 1966, ch. 316, § 8-302; 1990, ch. 384, § 17, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, substituted "a purchaser of a certificated or uncertificated security" for "upon delivery of a certificated or uncertificated security to a purchaser, the purchaser" in (a).

Cross References — Issuer's rights, liability and defenses, see §§ 75-8-202 et seq. Effect of issuer's restrictions on transfer, see § 75-8-204.

Bona fide purchaser, defined, see § 75-8-302.

Status and rights of party receiving security without necessary endorsement, see § 75-8-304.

Registration of transfer of securities, see §§ 75-8-401 et seq.

JUDICIAL DECISIONS

1. In general.
2. "Purchaser".
3. —"Bona fide purchaser".
4. —Not bona fide purchaser.
5. —"Holder in due course".
6. —Rights acquired by purchaser.
7. Liability for conversion.
8. "Transfer"; "delivery".
9. Practice and procedure; burden of proof.

1. In general.

The Uniform Commercial Code furnishes useful analogies in determining the liability of a stock broker for the conversion of shares through selling stolen shares on the order of a thief. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

2. "Purchaser".

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301 since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond

after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. *Phoenix Ins. Co. v. National Bank & Trust Co.*, 366 F. Supp. 340 (M.D. Pa. 1972), aff'd, 485 F.2d 681 (3d Cir. Pa. 1973).

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple purchaser. *E.F. Hutton & Co. v. Manufacturers Nat'l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

3. —"Bona fide purchaser".

While providing a remedy for the owners of misappropriated securities in UCC § 8-315, the Uniform Commercial Code does not foreclose recourse to an action at law for conversion (see Official Comment 2 to UCC § 8-315). However, the code has codified, in UCC §§ 8-301(2) and 8-302, the common-law protection extended to bona fide purchasers and has also extended, in UCC § 8-318, protection to agents who formerly went unprotected in many jurisdictions, even though they acted in good faith. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Brokerage firm which fulfilled its due diligence duties under "know your customer" rule of New York Stock Exchange (NYSE Rule 405) in accepting Government National Mortgage Association certificates from small investment adviser, who illegally used proceeds from pledge of certificates to invest in high-risk stocks, was bona fide purchaser of certificates for purposes of UCC § 8-301 and was not liable for conversion of certificates. *Cumis*

Ins. Soc'y, Inc. v. E.F. Hutton & Co., 457 F. Supp. 1380 (S.D.N.Y. 1978).

As a general rule, a bona-fide purchaser, on receiving delivery of an investment security, prevails under UCC § 8-301 against all adverse claimants. Bona-fide purchasers, therefore, are a favored subclass of purchasers who generally prevail over all claimants, including the true owners of the securities. However, this broad statement is subject to the exception contained in UCC § 8-311, which provides that in cases of forged indorsements, a bona-fide purchaser prevails against the true owner only if he has received new, reissued, or re-registered securities from the issuer. Thus, when reconciling the broad protection extended to a bona-fide purchaser under UCC § 8-301 with the protection afforded to the true owner of the securities under UCC § 8-311, as between the owner and a bona-fide purchaser relying on a forged indorsement of pledged securities, priority is given to the owner, unless the bona-fide purchaser also received reissued stock certificates from the issuer before receiving notice of the owner's adverse claim. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert

rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201 (44), value was given for transfer of stock when father-in-law accepted stock as security for pre-existing claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301, he acquired stock free of bank's adverse claim. *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. Utah 1974).

Where plaintiff's brother borrowed from a bank various sums pledging various securities issued in his sister's name which he had feloniously taken from her deposit box at bank, bank was "bona fide purchaser" of bearer bonds and was en-

titled to them. *Krick v. First Nat'l Bank*, 8 Ill. App. 3d 663, 290 N.E.2d 661 (1st Dist. 1972).

4. —Not bona fide purchaser.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

In action for conversion of bearer bonds which were subject of inter vivos gift to plaintiff from her husband, defendant holder of bonds, to whom plaintiff's husband had delivered bonds for safekeeping during plaintiff's illness, did not enjoy presumption of ownership from fact that bonds were in her possession, since under UCC § 8-301, on delivery of investment securities such as bonds in suit, purchaser acquires only those rights in such securities that his transferor had or had authority to convey, and in present case plaintiff's husband, after giving bonds to plaintiff, had no further rights in bonds or actual authority to convey them. *Friend v. Morrow*, 558 S.W.2d 780 (Mo. Ct. App. 1977).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. *Dean Witter & Co. v.*

Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974).

Purchasers of bank stock who, prior to the purchase, were notified of plaintiff's claim to the stock transferred were not bona fide purchasers without notice and stood in no better position than the transferor insofar as plaintiff's action to rescind the sale was concerned. *Sellers v. Sellers*, 428 P.2d 230 (Okla. 1967).

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple purchaser. *E.F. Hutton & Co. v. Manufacturers Nat'l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

5. —“Holder in due course”.

A holder in due course of a negotiable instrument acquires good title even though the paper was stolen and transferred by a thief. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

6. —Rights acquired by purchaser.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new,

reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

As a general rule, a bona-fide purchaser, on receiving delivery of an investment security, prevails under UCC § 8-301 against all adverse claimants. Bona-fide purchasers, therefore, are a favored subclass of purchasers who generally prevail over all claimants, including the true owners of the securities. However, this broad statement is subject to the exception contained in UCC § 8-311, which provides that in cases of forged indorsements, a bona-fide purchaser prevails against the true owner only if he has received new, reissued, or re-registered securities from the issuer. Thus, when reconciling the broad protection extended to a bona-fide purchaser under UCC § 8-301 with the

protection afforded to the true owner of the securities under UCC § 8-311, as between the owner and a bona-fide purchaser relying on a forged indorsement of pledged securities, priority is given to the owner, unless the bona-fide purchaser also received reissued stock certificates from the issuer before receiving notice of the owner's adverse claim. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

In action for conversion of bearer bonds which were subject of inter vivos gift to plaintiff from her husband, defendant holder of bonds, to whom plaintiff's husband had delivered bonds for safekeeping during plaintiff's illness, did not enjoy presumption of ownership from fact that bonds were in her possession, since under UCC § 8-301, on delivery of investment securities such as bonds in suit, purchaser acquires only those rights in such securities that his transferor had or had authority to convey, and in present case plaintiff's husband, after giving bonds to plaintiff, had no further rights in bonds or actual authority to convey them. *Friend v. Morrow*, 558 S.W.2d 780 (Mo. Ct. App. 1977).

Where prospective purchaser of corporate stock did not acquire security interest therein where he executed promissory note for agreed price and his note together with share certificates were placed in possession of third party for safekeeping under agreement that certificates, already made out in prospective purchaser's name, would be delivered to him when note was paid, there was no evidence that prospective purchaser received any rights in stock which was alleged to have served as collateral, since there was no evidence of delivery to prospective purchaser or his agent and the fact that stock was issued in his name was insufficient to establish delivery. *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 518 P.2d 1097 (1974).

7. Liability for conversion.

While bank-pledgee of stock has no greater rights in investment security than its pledgor-transferor had, UCC § 8-301 does not provide that purchaser assume obligations or liabilities of transferor and therefore, bank did not become converter upon acceptance of pledge and is not liable

on basis of conversion measure of damages. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

Stockbroker who purchased stolen treasury notes from bank which sold notes on behalf of bank's customer, was purchaser in good faith under UCC §§ 8-301 and 8-304 and, thus, was not liable for conversion of notes, notwithstanding transmittal slips from bank to broker stated that transactions were for account of named person, where broker bought notes without knowledge of any suspicious circumstances from bank with whom it had been dealing over the years. *United States Fid. & Guar. Co. v. Royal Nat'l Bank*, 545 F.2d 1330 (2d Cir. N.Y. 1976).

Where bank loan officer acted in good faith in collateralizing bearer debentures presented by borrower and, although interest coupons had not been clipped and borrower and his corporation were total strangers to bank, where entire transaction was free from taint of suspicious circumstances sufficient to constitute constructive notice of adverse claim or to create duty on part of bank to investigate nature and quality of borrower's possession, bank was not liable for conversion of bonds. *Colin v. Central Penn Nat'l Bank*, 404 F. Supp. 638 (E.D. Pa. 1975), *aff'd*, 544 F.2d 512 (3d Cir. Pa. 1976).

8. "Transfer"; "delivery".

Stockbroker's claim for damages for conversion of corporate bond was properly denied, and its contractual claims properly held to be satisfied by return of appreciated bond and accumulated dividends where original transfer and delivery to customer was voluntary and made in normal course of business; customer became owner of bond upon its delivery to him and, from that point forward, broker had its remedy in action for price. *Hayden Stone, Inc. v. Brode*, 508 F.2d 895 (7th Cir. Ill. 1974).

Under UCC § 8-301, title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued \$5000 check to transferor, in amount equal to his original con-

tribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. *Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 187 U.S.P.Q. 291 (S.D.N.Y. 1975).

Under UCC § 8-309, a transfer of an investment security to a purchaser requires both indorsement and delivery of the security. However, while the requirement of physical delivery may serve a valid, evidentiary purpose in the case of a sole owner, where the security is owned by more than one person and is transferred to more than one new owner, as where it is transferred to two persons in joint tenancy, the requirement that the new owners personally receive physical possession of the stock certificates to render the transfer valid is not applicable because both joint tenants cannot enjoy possession simultaneously; (holding, where original owner transferred securities to both herself and her son in joint tenancy, that original owner's voluntary parting with control, delivery, and indorsement of the stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309 and gave owner's son an interest in the certificates that he could thereafter convey to a bona-fide purchaser, and that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant). *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Trial court erred in finding that there was no valid transfer of corporate stock from share holder to his sons where testimony at trial supported conclusion that valid transfer took place and where plaintiffs did not challenge fact that father gave sons stock certificates, but only claimed that his action did not constitute delivery;

fact that father had access to vault where certificates were kept after transfer did preclude effective transfer between parties to transaction. *Brener v. Industrial Steel Container Co.*, 303 Minn. 275, 228 N.W.2d 115 (1975).

Where defendant made telephone call from Arizona to prospective purchaser in Texas, offering to sell and soliciting subscriptions for certain securities, telephone negotiations between defendant and purchaser amounted to an "offer" to person within state of Texas and fact that sale was to be finalized in Arizona was immaterial; criminal liability attached when defendant commenced dealing in securities within state of Texas, regardless of where commercial technicality of "delivery" was effectuated under UCC. *Shapple v. State*, 520 S.W.2d 766 (Tenn. Crim. App. 1974).

9. Practice and procedure; burden of proof.

Broker attempting to take advantage of bona fide purchaser protection of UCC § 8-301 must demonstrate compliance with "know your customer" rule (NYSE

Rule 405). *Cumis Ins. Soc'y, Inc. v. E.F. Hutton & Co.*, 457 F. Supp. 1380 (S.D.N.Y. 1978).

Where company obtained stock that was apparently owned by its employee, sold stock and used proceeds to discharge employee's debt to company and where plaintiff brought suit to recover stock alleging that he was owner thereof, that he had loaned shares to employee and that employee's knowledge was imputable to his employer, question of fact was raised as to whether defendant company was bona fide purchaser for value; burden of proving that purchase was for value, that it was made in good faith, and made without knowing, or having reason to know, of any adverse claim, became that of defendant. *Strand v. Prince-Covey & Co.*, 534 P.2d 892 (Utah 1975).

Stock certificates held by a bona fide purchaser for value cannot be cancelled, but one claiming to be a bona fide purchaser has the burden of proving himself to be one. *Gwatney v. Allied Cos.*, 238 Ark. 962, 385 S.W.2d 940, 21 A.L.R.3d 958 (1965).

RESEARCH REFERENCES

ALR. Construction and application of provision restricting sale or transfer of corporate stock. 2 A.L.R.2d 745.

Pledgee's right to inspection of books and records of corporation. 15 A.L.R.2d 11.

Effectiveness, as pledge, of transfer of corporate stock. 53 A.L.R.2d 1399.

Am Jur. 12 Am. Jur. 2d, Bonds § 50.

15A Am. Jur. 2d, Commercial Code §§ 69-71, 86, 89, 95-97.

18 Am. Jur. 2d, Corporations §§ 373, 465, 467, 468, 473, 474.

Unauthorized indorsement; effect of bona fide purchase and re-registration of

security, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

Fraud in subscriptions to, or sale, or purchase of, shares, 7 Am. Jur. Pl & Pr Forms (Rev), Corporations, Forms 111-119.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121, 8:126.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2811 et seq. (investment securities, transfer of).

CJS. 19 C.J.S., Corporations §§ 143, 283, 670.

§ 75-8-303. Protected purchaser.

(a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

- (1) Gives value;
- (2) Does not have notice of any adverse claim to the security; and
- (3) Obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

SOURCES: Laws, 1996, ch. 468 § 30, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-303 [Codes, 1942, § 41A:8-303; Laws, 1966, ch. 316, § 8-303; 1990, ch. 384, § 18, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Protection of purchasers of instruments and documents, see § 75-9-309.

Notice of adverse claims, see § 75-8-105.

Status and rights of party receiving security without necessary endorsement, see § 75-8-304.

Time of notice of defects in issue of security or defense of issuer, see 75-8-203.

JUDICIAL DECISIONS

1. In general.
2. "Bona fide purchaser".
3. —Value given.
4. —Not bona fide purchaser.
5. —Notice of invalidity.
6. Practice and procedure; burden of proof.

1. In general.

The Code replaces the Uniform Stock Transfer Act in defining what constitutes value for the purpose of the transfer of shares of stock. *Fried v. Margolis*, 296 F.2d 670 (2d Cir. N.Y. 1961), rev'd on other grounds sub nom. *Wolf v. Weinstein*, 372 U.S. 633, 83 S. Ct. 969, 10 L. Ed. 2d 33 (1963), reh'g denied, 373 U.S. 928, 83 S. Ct. 1522, 10 L. Ed. 2d 427 (1963).

2. "Bona fide purchaser".

In suit by owner of stolen treasury bills against bank and its officers for conversion, where (1) owner on July 21, 1970, discovered that bills had been stolen from owner's premises by unknown person, (2) next person known to possess bills was person known to defendants, (3) such person, on discharging loan made by defendant bank, delivered the stolen bills in envelope on August 10, 1970, to one of bank's officers without exchange of receipts or proof of such person's ownership of bills, and (4) bills were later redeemed by bank only because they had not been reported missing to district Federal reserve bank or United States Treasury De-

partment, court held (1) that resolution of case depended on fact issue of bona fides of transfer of bills from third person to bank, (2) that such transfer would either entitle or deprive bank of protective status of bona fide purchaser under UCC § 8-301 and § 8-302, and (3) that since district court had wrongfully placed on owner of stolen bills burden of proving that bank was not bona fide purchaser, such ruling unwarrantedly influenced district court's ultimate findings of fact. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Where (1) municipal bond dealer, prior to filing against it of involuntary petition in bankruptcy, (a) sold certain bonds to customer, (b) sent customer's nominee confirmation tickets concerning such sale, and (c) sent properly completed confirmation and delivery tickets concerning sale to defendant municipal-bond clearing facility in order to effectuate delivery of bonds to dealer's customer, and where (2) defendant clearing facility physically allocated specific bond certificates corresponding to dealer's instructions and recorded explicitly identifying information on bonds' delivery forms (including certificate numbers and name of dealer's customer), activities of dealer and defendant clearing facility constituted sufficient identification, "by book entry or otherwise," of bonds sold to customer under UCC § 8-313, and dealer, by virtue of its contractual relationship with clearing fa-

cility, was not required by UCC § 8-313 to have actual physical possession of certificates. *Matthysse v. Securities Processing Servs., Inc.*, 444 F. Supp. 1009, 23 U.C.C. Rep. Serv. 435 (S.D.N.Y. 1977) (applying New York law; holding that possession of customer's bonds by clearing facility was sufficient to satisfy broker's possession requirement under UCC § 8-313, and that under UCC § 8-302, customer was bona-fide purchaser of bonds who took them free of clearing facility's adverse claim thereto).

Bank exercised good faith in purchase of 16 stolen treasury bills and was bona fide purchaser thereof within meaning of UCC § 8-302 where (1) bills were presented to bank during one-month period by two persons who were well-known customers of bank, (2) such persons had recently cashed two valid treasury bills at bank and validity of such bills had been confirmed by federal reserve bank, (3) stolen bills were in bearer form and nothing on their face indicated that they were invalid, and (4) bank purchased all 16 bills before it received any notice that any of them had been stolen. *Morgan Guar. Trust Co. v. New England Merchants Nat'l Bank*, 438 F. Supp. 97 (D. Mass. 1977).

In action to recover value of stock certificates which were stolen from broker, accepted by bank as collateral for loan, and subsequently sold to satisfy debt, testimony by bank president that, inter alia, prospective borrower offered certificates as collateral for loan, that certificates were issued to and endorsed by broker with transferee's name left blank, that borrower executed affidavit stating that he was rightful owner of certificates, that bank contacted issuing corporation and verified listing of stock in broker's name, and that bank sent certificates with borrower's name added as transferee to issuing corporation for issuance of new certificates in borrower's name, which were issued and held by bank, established prima case that bank was bona fide purchaser of stock certificates under UCC § 8-302; bank became "purchaser for value" when it accepted stock certificates as collateral. *Fidelity & Cas. Co. v. Key Biscayne Bank*, 501 F.2d 1322 (5th Cir. Fla. 1974), reh'g denied, 504 F.2d 760 (5th Cir. Fla. 1974).

Where plaintiff's brother borrowed from a bank various sums pledging various securities issued in his sister's name which he had feloniously taken from her deposit box at bank, bank was "bona fide purchaser" of bearer bonds and was entitled to them. *Krick v. First Nat'l Bank*, 8 Ill. App. 3d 663, 290 N.E.2d 661 (1st Dist. 1972).

3. —Value given.

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201 (44), value was given for transfer of stock when father-in-law accepted stock as security for pre-existing claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301, he acquired stock free of bank's adverse claim. *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. Utah 1974).

Brokerage firm which received stock for account of customer and promptly credited sales price to customer's account acquired stock in partial satisfaction of pre-existing claim (UCC § 1-201, subd 44(b)), and thus for value within meaning of UCC § 8-302. *Colonial Sec., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 461 F. Supp. 1159 (S.D.N.Y. 1978).

4. —Not bona fide purchaser.

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer

was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. *Dean Witter & Co. v. Educational Computer Corp.*, 369 F. Supp. 757 (E.D. Pa. 1974).

Judgment creditor who purchased shares of stock at sheriff's sale was not "bona fide purchaser" under UCC § 8-302 since she was not "purchaser" and did not take by "delivery"; therefore, she was not entitled to registration of transfer under UCC § 8-405 where securities had previously been lost and replaced by issuer. *Mazer v. Williams Bros. Co.*, 461 Pa. 587, 337 A.2d 559, 88 A.L.R.3d 942 (1975).

Commercial factor, who took possession of bearer bond as security for noninterest-bearing loan, which had no certain date for repayment and was made to individual with whom lender had had no prior personal transactions, was not a bona fide purchaser for value as against true owner of bond, which had been stolen. *Brown v. Rosetti*, 66 Misc. 2d 239 (1971).

5. —Notice of invalidity.

Bank was not bona fide purchaser within meaning of UCC § 8-302 and was liable for conversion of stolen treasury bills, where owner notified bank of loss but bank did not make reasonable efforts to advise its discount and collateral department of existence of lost securities file, and where bank subsequently took bills as collateral for loans. The test of sufficiency of notice is objective one under UCC § 1-201(27) and not whether or not individuals involved were in fact aware of notice. *Morgan Guar. Trust Co. v. Third Nat'l Bank*, 529 F.2d 1141 (1st Cir. Mass. 1976).

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in

good faith. *Folsom v. Security Nat'l Bank*, 32 Colo. App. 91, 507 P.2d 1114 (1973).

6. Practice and procedure; burden of proof.

In suit by owner of stolen treasury bills against bank and its officers for conversion, where (1) owner on July 21, 1970, discovered that bills had been stolen from owner's premises by unknown person, (2) next person known to possess bills was person known to defendants, (3) such person, on discharging loan made by defendant bank, delivered the stolen bills in envelope on August 10, 1970, to one of bank's officers without exchange of receipts or proof of such person's ownership of bills, and (4) bills were later redeemed by bank only because they had not been reported missing to district Federal reserve bank or United States Treasury Department, court held (1) that resolution of case depended on fact issue of bona fides of transfer of bills from third person to bank, (2) that such transfer would either entitle or deprive bank of protective status of bona fide purchaser under UCC § 8-301 and § 8-302, and (3) that since district court had wrongfully placed on owner of stolen bills burden of proving that bank was not bona fide purchaser, such ruling unwarrantedly influenced district court's ultimate findings of fact. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Where company obtained stock that was apparently owned by its employee, sold stock and used proceeds to discharge employee's debt to company and where plaintiff brought suit to recover stock alleging that he was owner thereof, that he had loaned shares to employee and that employee's knowledge was imputable to his employer, question of fact was raised as to whether defendant company was bona fide purchaser for value; burden of proving that purchase was for value, that it was made in good faith, and made without knowing, or having reason to know, of any adverse claim, became that of defendant. *Strand v. Prince-Covey & Co.*, 534 P.2d 892 (Utah 1975).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona

fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of

authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. *Hollywood Nat'l Bank v. IBM*, 38 Cal. App. 3d 607 (2d Dist. 1974).

RESEARCH REFERENCES

ALR. Who is a "bona fide purchaser" of investment security under UCC § 8-302. 88 A.L.R.3d 949.

Am Jur. 12 Am. Jur. 2d, Bonds §§ 32, 41.

15A Am. Jur. 2d, Commercial Code §§ 69-71, 89, 95, 96.

18 Am. Jur. 2d, Corporations §§ 311, 413, 465 et seq.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:54-8:57.

CJS. 18 C.J.S., Corporations § 143.

19 C.J.S., Corporations §§ 666, 667, 670, 671.

§ 75-8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in Section 75-8-108 and not an obligation that the security will be honored by the issuer.

SOURCES: Laws, 1996, ch. 468 § 31, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-304 [Codes, 1942, § 41A:8-304; Laws, 1966, ch. 316, § 8-304; 1990, ch 384, § 19, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Right of transferee of negotiable document of title not containing endorsement, see § 75-7-506.

Indorsement, see § 75-8-107.

Warranties on presentment and transfer of security, see § 75-8-108.

Notice of defect or defense, see § 75-8-202.

Requisite showing on security of restriction on its transfer, see § 75-8-204.

Rights and title acquired by purchaser, see § 75-8-301.

What constitutes a protected purchaser, see § 75-8-303.

Effect of delivery without endorsement, see § 75-8-304.

Effect of guaranteeing endorsement, see § 75-8-306.

Purchaser's right to requisites for registration of transfer on books, see § 75-8-307.

Registration of securities, see §§ 75-8-401 et seq.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

1. In general.
2. Absence of indorsement.
3. Indorsement and delivery.
4. Delivery.
5. Indorsement.
6. Actions involving stolen securities.
- 7-10. [Reserved for future use].

B. Pre-Uniform Commercial Code Decisions.

11. In general.

A. Decisions Under Uniform Commercial Code.

1. In general.

There is no liability imposed on an accommodation endorser to a guarantor. Thus, an accommodation endorser owes no duty to a guarantor in the event that the guarantor, who has the liability of a co-maker, pays the note's holder; however, this does not preclude an accommodation endorser and a guarantor from agreeing or contracting privately as to their liability. *Comfort Eng'g Co. v. Kinsey*, 523 So. 2d 1019 (Miss. 1988).

Under UCC § 8-301, title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to

another corporate functionary, and where corporation issued \$5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. *Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 187 U.S.P.Q. 291 (S.D.N.Y. 1975).

One acquiring shares of stock by delivery after indorsement in blank has the right, as the holder, to convert the blank indorsement into a special indorsement by designating himself as the transferee. *Morrison v. Liberty Disct. & Sav. Bank*, 61 Lack. Jur. 37 (Pa. 1960).

2. Absence of indorsement.

Where husband and wife each offered to purchase 50 shares of stock in corporation for specified purchase price, offers were accepted by corporation's board of directors, and consideration for issuance of all such shares was provided by husband,

under UCC § 8-307, a gift to wife by husband of 50 shares of stock was effected, and such gift was not invalidated by corporation's subsequent failure to comply fully with statutory formalities for issuance of stock certificates representing such shares. *Ashley v. Ashley*, 482 Pa. 228, 393 A.2d 637 (1978).

Where husband physically delivered stock certificate to wife with intention of making gift, transfer was complete even though certificate was not endorsed. *Rogers v. Rogers*, 271 Md. 603, 319 A.2d 119 (1974).

Holder of promissory notes to whom unendorsed stock certificate was pledged as collateral security has the right to compel the pledgor to endorse the certificate and could obtain title to certificate on books of corporation, for as against the transferor the transfer of the security was complete upon delivery even though no endorsement appeared thereon. *Goldammer v. Fredricks (In re Jorgensen's Estate)*, 70 Ill. App. 2d 398, 217 N.E.2d 290 (1st Dist. 1966).

3. Indorsement and delivery.

Indorsement and delivery of stock certificate completed gift; donee became owner of stock at that moment; subsequent location of certificate itself or fact that stock was not transferred on corporate records cannot alter that fact accomplished. *Toigo v. Ross*, 107 Ill. App. 2d 395, 246 N.E.2d 68 (2d Dist. 1969).

A stock certificate properly endorsed and delivered as an absolute gift to the donee is "transferred," even though transfer was not made on books of issuing corporation prior to donor's death. *In re Ruszkowski's Estate*, 45 Misc. 2d 380 (1965).

4. Delivery.

Although a transfer of stock requires delivery under UCC § 8-309, title may pass by constructive delivery. Thus, if the parties so intend, title to stock passes to the buyer by delivery to an escrow agent for ultimate delivery to the buyer on payment of the purchase price or part thereof. *Application of Stewart Becker, Ltd.*, 1978, 94 Misc.2d 766, 405 N.Y.S.2d 571.

Under UCC § 8-309, a transfer of an investment security to a purchaser re-

quires both indorsement and delivery of the security. However, while the requirement of physical delivery may serve a valid, evidentiary purpose in the case of a sole owner, where the security is owned by more than one person and is transferred to more than one new owner, as where it is transferred to two persons in joint tenancy, the requirement that the new owners personally receive physical possession of the stock certificates to render the transfer valid is not applicable because both joint tenants cannot enjoy possession simultaneously. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Holding, where original owner transferred securities to both herself and her son in joint tenancy, that original owner's voluntary parting with control, delivery, and indorsement of the stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309 and gave owner's son an interest in the certificates that he could thereafter convey to a bona-fide purchaser, and that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

When aunt caused stock to be issued in joint names with nephew and niece, respectively, and when delivery of new certificates was made to aunt, requirements of UCC § 8-309, stating that endorsement does not constitute transfer until delivery of security, and 8-313, stating that delivery to purchaser occurs when he or persons designated by him acquires possession, were met notwithstanding physical delivery of stock certificates was not made to nephew or niece. *Robison v. Fickle*, 167 Ind. App. 651, 340 N.E.2d 824 (1976).

Under UCC § 8-301, title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued \$5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, re-

mained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. *Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 187 U.S.P.Q. 291 (S.D.N.Y. 1975).

Fact that stockholder endorsed in blank certificates with the intention of giving them as Christmas presents to his children was not effective to transfer ownership of the shares represented by the certificates, and where certificates remained undelivered at time of stockholder's death the endorsements did not serve to reduce the number of shares he owned at that time. *Whitfield v. Metropolitan Life Ins. Co.*, 262 F. Supp. 977 (W.D. Ark. 1967).

5. Indorsement.

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control,

delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Held that under above statute title to unindorsed securities may be transferred by delivery. *In re Ruszkowski's Estate*, 45 Misc. 2d 380 (1965).

6. Actions involving stolen securities.

When a stockbroker is sued by the true owner of shares for conversion when the broker received the shares from a thief and paid the proceeds of the sale to the thief or his confederate, it is no defense that the owner of the shares may have been negligent in handling them. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

7-10. [Reserved for future use].

B. Pre-Uniform Commercial Code Decisions.

11. In general.

The Uniform Stock Transfer Act does not determine any rights as between a transferor and a transferee of certificates of stock where no innocent purchaser is involved. *Salmon v. Moore*, 238 Miss. 459, 118 So. 2d 867 (1960).

The Uniform Stock Transfer Act does not purport to make the bare possession of a certificate, indorsed in blank, legal ownership for all purposes, and equities in favor of the transferor are undisturbed by the act except where the rights of innocent purchasers intervene. *Salmon v. Moore*, 238 Miss. 459, 118 So. 2d 867 (1960).

In addition to the matter of uniformity, the main purposes of the Uniform Stock Transfer Act are: (1) To make certificates of stock stand as a physical representative of the stock itself to the fullest extent possible, and not as mere evidence of the stock, and (2) to give to the certificates of stock certain characteristics of negotiable paper so as to facilitate the transfer of stock and to make good the title of one

who, in good faith, for value without notice of any adverse interest, purchases a stock certificate bearing the indorsement in blank of the registered owner. *Salmon v. Moore*, 238 Miss. 459, 118 So. 2d 867 (1960).

In absence of intervening rights of innocent purchasers, the Uniform Stock Transfer Act did not affect the rights to certain certificates of stock as between a person to whom the certificates had been issued, and her sister, with whom the certificates had been entrusted with indorsements in blank, and in whose possession the stocks were found upon the sister's death. *Salmon v. Moore*, 238 Miss. 459, 118 So. 2d 867 (1960).

RESEARCH REFERENCES

ALR. Necessity of delivery of stock certificate to complete valid gift of stock. 23 A.L.R.2d 1171.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 220.

15A Am. Jur. 2d, Commercial Code §§ 104, 105, 106.

18A Am. Jur. 2d, Corporations §§ 289, 455, 460-462, 481.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:41, 8:42 (duty to indorse).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2831 et seq (indorsements).

CJS. 18 C.J.S., Corporations §§ 226 et seq.

§ 75-8-305. Instruction.

(a) If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.

(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by Section 75-8-108 and not an obligation that the security will be honored by the issuer.

SOURCES: Laws, 1996, ch. 468 § 32, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-305 [Codes, 1942, § 41A:8-305; Laws, 1966, ch. 316, § 8-305; 1990, ch. 384, § 20, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) The signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) The signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) and also warrants that at the time the instruction is presented to the issuer:

(1) The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) The transfer of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

(d) A guarantor under subsections (a) and (b) or a special guarantor under subsection (c) does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

SOURCES: Laws, 1996, ch. 468 § 33, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-306 [Codes, 1942, § 41A:8-306; Laws, 1966, ch. 316, § 8-306; 1990, ch. 384, § 21, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Registration of transfers, see §§ 75-8-401 et seq.

JUDICIAL DECISIONS

1. In general.

In action by trustee of securities against issuer for registering transfer without plaintiff's indorsement, where evidence showed (1) that plaintiff's son had stolen securities in suit and then, in conspiracy with manager of branch of cross-defendant bank, had forged plaintiff's signature on stock powers relating to securities, (2) that bank's branch manager had subsequently affixed bank's guarantee to such securities with knowledge that plaintiff's signature thereon was forged, and (3) that such fraudulently indorsed stock powers had then been delivered to cross complainant broker who, allegedly relying on bank's guarantee of plaintiff's signature, also guaranteed such signature and transmitted stock powers to issuer to effect transfer of securities, court held, on broker's crossclaim against bank under UCC § 8-312, dealing with liability of person guaranteeing signature of indorser of security, that since no issue as to genuineness of the guarantee or knowledge of broker as to true facts involved had been raised by bank on broker's motion for summary judgment against bank, such motion would be granted. *Pless v. CPC Int'l, Inc.*, 82 F.R.D. 105 (W.D. Pa. 1979).

UCC § 8-312 does not impose strict liability on the guarantors of signatures and indorsements on securities. *Flying Diamond Corp. v. Pennaluna & Co.*, 586 F.2d 707 (9th Cir. Idaho 1978).

UCC § 8-312 sets forth two prerequisites, reliance and proximate cause, to the imposition of liability under UCC § 8-312. *Flying Diamond Corp. v. Pennaluna & Co.*, 586 F.2d 707 (9th Cir. Idaho 1978).

Issuer of stock was not entitled to rely, under UCC § 8-312, on guarantees by broker and bank of signatures and indorsements on stock certificates in case involving transfer of unauthorized certificates of issuer with forged indorsements where issuer, although having had reason to know that certificates, indorser signatures thereon, and guarantees of such

signatures were improper, still did not exercise due diligence in the matter. In such case, proximate cause of issuer's resulting loss was its own conduct in entrusting stock-transfer agent with blank certificates that contained facsimile signatures of issuer's president and secretary and in failing to take proper precautions after learning of theft of such certificates by transfer agent's president. *Flying Diamond Corp. v. Pennaluna & Co.*, 586 F.2d 707 (9th Cir. Idaho 1978).

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401, and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401, had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

UCC § 8-312, dealing with effect of guaranteeing signatures or indorsements, is intended to protect subsequent transferees and purchasers, who are described in UCC § 8-312 as "any person taking or dealing with the security in reliance on the guarantee." However, UCC § 8-312 does not preclude owners or others from pursuing different types of remedies, since UCC § 8-315 provides that any person against whom the transfer of a security is wrongful for any reason, including

his incapacity, may have damages against anyone except the bona-fide purchaser. *Roth v. Roth*, 571 S.W.2d 659, 5 A.L.R.4th 350 (Mo. Ct. App. 1978).

Plaintiff's complaint did not allege knowledge or connivance on part of defendants in alleged scheme to defraud; in sections of complaint alleging conspiracy to defraud, plaintiff does not name these

defendants; held, plaintiff fails to state claim within asserted knowledge exception to UCC § 8-312 rule that guarantee of signature on securities document inures only to those "taking or dealing with the security in reliance on the guarantee." *Wood v. Wood*, 312 F. Supp. 762 (S.D.N.Y. 1970).

RESEARCH REFERENCES

Am Jur. 18A Am. Jur. 2d, Corporations §§ 246, 251, 413, 469-471.

Guarantee of signature of indorser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:71.

CJS. 18 C.J.S., Corporations § 241.
38 C.J.S., Guaranty §§ 57 et seq.

§ 75-8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

SOURCES: Laws, 1996, ch. 468 § 34, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-307 [Codes, 1942, § 41A:8-307; Laws, 1966, ch. 316, § 8-307; 1990, ch. 384, § 22, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effect of delivery without endorsement, see § 75-8-304.

When issuer under duty to register transfer of security, see § 75-8-401.

Right of issuer to require that endorsements are effective, see § 75-8-402.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 91.

18A Am. Jur. 2d, Corporations § 251.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev ed), Investment Securities, Form 8:122.

Right of purchaser to demand transferor prove authority to transfer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8-Investment Securities, §§ 253:2841 et seq.

§§ 75-8-308 through 75-8-321. Repealed.

Repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

§ 75-8-308. [Codes, 1942, § 41A:8-308; Laws, 1966, ch. 316, § 8-308; Laws 1990, ch. 384, § 23]

§ 75-8-309. [Codes, 1942, § 41A:8-309; Laws, 1966, ch. 316, § 8-309; Laws, 1990, ch. 384, § 24]

§ 75-8-310. [Codes, 1942, § 41A:8-310; Laws, 1966, ch. 316, § 8-310; Laws, 1990, ch. 384, § 25]

§ 75-8-311. [Codes, 1942, § 41A:8-311; Laws, 1966, ch. 316, § 8-311; Laws, 1990, ch. 384, § 26]

§ 75-8-312. [Codes, 1942, § 41A:8-312; Laws, 1966, ch. 316, § 8-312; Laws, 1990, ch. 384, § 27]

§ 75-8-313. [Codes, 1942, § 41A:8-313; Laws, 1966, ch. 316, § 8-313; Laws, 1990, ch. 384, § 28]

§ 75-8-314. [Codes, 1942, § 41A:8-314; Laws, 1966, ch. 316, § 8-314; Laws, 1990, ch. 384, § 29]

§ 75-8-315. [Codes, 1942, § 41A:8-315; Laws, 1966, ch. 316, § 8-315; Laws, 1990, ch. 384, § 30]

§ 75-8-316. [Codes, 1942, § 41A:8-316; Laws, 1966, ch. 316, § 8-316; Laws, 1990, ch. 384, § 31]

§ 75-8-317. [Codes, 1942, § 41A:8-317; Laws, 1966, ch. 316, § 8-317; Laws, 1990, ch. 384, § 32]

§ 75-8-318. [Codes, 1942, § 41A:8-318; Laws, 1966, ch. 316, § 8-318; Laws, 1990, ch. 384, § 33]

§ 75-8-319. [Codes, 1942, § 41A:8-319; Laws, 1966, ch. 316, § 8-319; Laws, 1990, ch. 384, § 34]

§ 75-8-320. [Codes, 1942, § 41A:8-320; Laws, 1966, ch. 316, § 8-320; Laws, 1990, ch. 384, § 35]

§ 75-8-321. [Laws, 1990, ch. 384, § 36]

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Former § 75-8-308 was entitled: Indorsement, how made; special indorsement; indorser not a guarantor; partial assignment.

Former § 75-8-309 was entitled: Effect of indorsement without delivery.

Former § 75-8-310 was entitled: Indorsement of security in bearer form.

Former § 75-8-311 was entitled: Effect of unauthorized indorsement.

Former § 75-8-312 was entitled: Effect of guaranteeing signature or endorsement.

Former § 75-8-313 was entitled: When transfer of security or limited interest occurs.

Former § 75-8-314 was entitled: Fulfilling duty to transfer; when completed.

Former § 75-8-315 was entitled: Action against purchaser based upon wrongful transfer.

Former § 75-8-316 was entitled: Purchaser's right to requisites for registration of transfer on books.

Former § 75-8-317 was entitled: Attachment or levy upon security.

Former § 75-8-318 was entitled: No conversion by good faith delivery.

Former § 75-8-319 was entitled: Statute of frauds.

Former § 75-8-320 was entitled: Transfer or pledge within a central depository system.

Former § 75-8-321 was entitled: Enforcement of security interest in a security; termination of security interest; effective date.

PART 4.

REGISTRATION.

SEC.

- 75-8-401. Duty of issuer to register transfer.
75-8-402. Assurance that indorsement or instruction is effective.
75-8-403. Demand that issuer not register transfer.
75-8-404. Wrongful registration.
75-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.
75-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.
75-8-407. Authenticating trustee, transfer agent, and registrar.
75-8-408. Repealed.

§ 75-8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) The indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) Reasonable assurance is given that the indorsement or instruction is genuine and authorized (Section 75-8-402);

(4) Any applicable law relating to the collection of taxes has been complied with;

(5) the transfer does not violate any restriction on transfer imposed by the issuer in accordance with Section 75-8-204;

(6) A demand that the issuer not register transfer has not become effective under Section 75-8-403, or the issuer has complied with Section 75-8-403(b) but no legal process or indemnity bond is obtained as provided in Section 8-403(d); and

(7) The transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

SOURCES: Laws, 1996, ch. 468 § 35, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-401 [Codes, 1942, § 41A:8-401; Laws, 1966, ch. 316, § 8-401; 1990, ch. 384, § 37, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Conflict of laws, see § 75-8-110.

Effect of issuer's restrictions on transfer, see § 75-8-204.

Rights and title acquired by purchaser, see § 75-8-302.

Duty of authenticating trustee, transfer agent or registrar, see 75-8-407.

JUDICIAL DECISIONS

1. In general; duty to register.
2. Knowledge of invalidity.
3. —Duty to inquire.
4. Restrictive transfer legend.
5. —Refusal to remove.
6. Practice and procedure.
7. —Burden of proof.
8. —Damages and costs.
9. —Standing.

1. In general; duty to register.

UCC § 8-401 requires indorsement and presentation of stock certificate to issuing corporation as conditions precedent to issuer's obligation to register transfer of ownership of shares represented by such certificate. *Wanland v. C.E. Thompson Co.*, 64 Ill. App. 3d 46, 380 N.E.2d 1012 (1st Dist. 1978).

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and

precluded summary judgment in their favor. *DeWitt v. American Stock Transf. Co.*, 440 F. Supp. 1084 (S.D.N.Y. 1977).

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in good faith. *Folsom v. Security Nat'l Bank*, 32 Colo. App. 91, 507 P.2d 1114 (1973).

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. *Kanton v. United States Plastics, Inc.*, 248 F. Supp. 353 (D.N.J. 1965).

2. Knowledge of invalidity.

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in good faith. *Folsom v. Security Nat'l Bank*, 32 Colo. App. 91, 507 P.2d 1114 (1973).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder such as the assignee, such a restriction is ineffective to support the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. *Perugino v. Samson Land & Dev. Co.*, 39 Pa. D. & C.2d 500 (1965).

Where shares of stock are fully indorsed for transfer, the issuer must register the transfer unless it has knowledge of some unrightfulness of the transfer or some duty to inquire into its rightfulness, such as by notice of another claim. *Morrison v. Liberty Dist. & Sav. Bank*, 61 Lack. Jur. 37 (Pa. 1960).

3. —Duty to inquire.

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. *Kanton v. United States Plastics, Inc.*, 248 F. Supp. 353 (D.N.J. 1965).

Where shares of stock are fully indorsed for transfer, the issuer must register the transfer unless it has knowledge of some unrightfulness of the transfer or some duty to inquire into its rightfulness, such as by notice of another claim. *Morrison v. Liberty Dist. & Sav. Bank*, 61 Lack. Jur. 37 (Pa. 1960).

4. Restrictive transfer legend.

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. *Dean Witter & Co. v. Educational Computer Corp.*, 369 F. Supp. 757 (E.D. Pa. 1974).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder such as the assignee, such a restriction is ineffective to support

the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. *Perugino v. Samson Land & Dev. Co.*, 39 Pa. D. & C.2d 500 (1965).

5. —Refusal to remove.

Under UCC §§ 8-401 and 8-406, bank, acting as transfer agent for corporation's stock, was not jointly or severally liable with corporation for its refusal on corporation's instructions to remove restrictions from shares belonging to former employee of corporation; bank's refusal to remove restrictive legends from employee's shares did not qualify as refusal to "register a transfer" under terms of § 8-401 so as to subject bank to liability under § 8-406; removal of legend was obvious first step in, and necessary incident to contemplated transfer of stock, but was not equivalent of registration of transfer, and thus, bank retained its common law immunity against suits by injured shareholders; bank, as transfer agent, faced with former employee's request and corporation's order, was not required to determine whether former employee's demotion or discharge entitled him to release of restrictions on his shares and incur thereby full liability should court, after litigation and opportunity for deliberation, rule against bank's decision. *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 362 N.E.2d 222 (1977).

Defendant-bank, as transfer agent for bankrupt corporation, was not liable to plaintiff-owners of "legended" investment stock in corporation under UCC §§ 8-401 and 8-406 for wrongful refusal to remove restrictive legends from plaintiffs' shares, resulting in plaintiffs' inability to sell them prior to corporation's bankruptcy; although UCC has abrogated common-law immunity of transfer agents for mere "nonfeasance" (such as failure to act to remove legends) in suits brought by wrongfully injured shareholders, and assuming that plaintiffs' request for removal of legends was substantial equivalent of "request to register transfer" under UCC § 8-401, where restrictive legend expressly required "opinion of counsel" prior to transfer that registration of securities was not required and plaintiffs failed to

tender such "opinion of counsel," their requests for transfer were not "rightful" under UCC § 8-401, and consequently bank had no duty to remove legends and issue new unrestricted certificates. *Kenler v. Canal Nat'l Bank*, 489 F.2d 482 (1st Cir. Me. 1973).

6. Practice and procedure.

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and precluded summary judgment in their favor. *DeWitt v. American Stock Transf. Co.*, 440 F. Supp. 1084 (S.D.N.Y. 1977).

It was proper for trial court to issue temporary mandatory injunction requiring defendant corporation to register in plaintiff's name convertible subordinated notes, issued by defendant, during pendency of litigation which challenged plaintiff's right to own notes on ground that his

covenant not to invest or engage in similar business had been breached. *Chalfen v. Medical Inv. Corp.*, 297 Minn. 174, 210 N.W.2d 216 (1973).

7. —Burden of proof.

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. *Hollywood Nat'l Bank v. IBM*, 38 Cal. App. 3d 607 (2d Dist. 1974).

8. —Damages and costs.

In suit to enforce registration of shares, purchaser may not recover counsel fees and expenses as "loss" resulting from refusal of corporation to register transfer. *Rosenberg v. Nathan Benjamin, Inc.*, 49 Pa. D. & C.2d 188 (1969).

9. —Standing.

Stockholder alleging refusal of management to make timely transfer and reissue of unrestricted stock could not maintain derivative stockholder's action where, under UCC § 8-401, stockholder had individual cause of action for loss resulting from any unreasonable delay in registration or from failure or refusal to register transfer. *Reeves v. Transport Data Communications, Inc.*, 318 A.2d 147 (Del. Ch. 1974).

RESEARCH REFERENCES

ALR. Rights, duties and liability of corporation in connection with stock of infants or incompetents. 3 A.L.R.2d 881.

Rights, duties and liabilities in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock. 22 A.L.R.2d 12.

Necessity of delivery of stock certificate to complete valid gift of stock. 23 A.L.R.2d 1171.

Corporation's knowledge or suspicion of conflicting rights. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 78, 110, 111-117.

18A Am. Jur. 2d, Corporations §§ 203, 251, 286, 349, 488, 506.

18B Am. Jur. 2d, Corporations § 1536.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:122, 8:123, 8:125.

Duty of issuer to register transfer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2871, 253:2872.

CJS. 18 C.J.S., Corporations § 275.

§ 75-8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) In all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) If the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) If the indorsement is made or the instruction is originated by a fiduciary pursuant to Section 75-8-107(a)(4) or (a)(5), appropriate evidence of appointment or incumbency;

(4) If there is more than one (1) fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) If the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection, assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

(b) An issuer may elect to require reasonable assurance beyond that specified in this section.

(c) In this section:

(1) "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) "Appropriate evidence of appointment or incumbency" means:

(i) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within sixty (60) days before the date of presentation for transfer; or

(ii) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.

SOURCES: Laws, 1996, ch. 468 § 36, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-402 [Codes, 1942, § 41A:8-402; Laws, 1966, ch. 316, § 8-402; 1990, ch. 384, § 38, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Obligation of good faith, see § 75-1-203.

Liability of issuer for failure or refusal to register transfer, see § 75-8-401.

Limited duty of inquiry, see § 75-8-403.

Liability for registration, see § 75-8-404.

RESEARCH REFERENCES

ALR. Rights, duties and liability of corporation in connection with transfer of stock of infant or incompetent. 3 A.L.R.2d 881.

Rights, duties and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate on ground of knowledge or suspicion of conflicting rights of registered holder or third person. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 69-71, 113, 114.

18 Am. Jur. 2d, Corporations §§ 179, 180, 199-203, 251, 349, 463, 484-466, 1145.

Guarantee of signature of indorser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:71.

CJS. 18 C.J.S., Corporations §§ 275, 276.

§ 75-8-403. Demand that issuer not register transfer.

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who initiated the demand at the address provided in the demand and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) The certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) A demand that the issuer not register transfer had previously been received; and

(3) The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in subsection (b)(3) may not exceed thirty (30) days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) File with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.

(e) This section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective.

SOURCES: Laws, 1996, ch. 468 § 37, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-403 [Codes, 1942, § 41A:8-403; Laws, 1966, ch. 316, § 8-403; 1990, ch. 384, § 39, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Obligation of good faith, see § 75-1-203.

Notice of purchaser of adverse claims, see § 75-8-105(d).

Liability for delay or failure or refusal to register transfer, see § 75-8-401.

Assurance that indorsements are effective, see § 75-8-402.

Liability for registration, see § 75-8-404.

Lost, destroyed and stolen securities, see § 75-8-405.

Notice to authenticating trustee, transfer agent, registrar, etc., see § 75-8-406.

JUDICIAL DECISIONS

1. In general.

Had stock warrants been issued in registered form and had they been presented for registration, and had the broker who through mistake had transmitted the warrants for registration filed suit before the registration process was completed, it could prevent the issuer from proceeding.

E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. *Kanton v. United States Plastics, Inc.*, 248 F. Supp. 353 (D.N.J. 1965).

RESEARCH REFERENCES

ALR. Duty of corporation to refuse to transfer stock on books to one who pre-

sents properly indorsed certificate, on ground of knowledge or suspicion of con-

flicting rights of registered holder or third person. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 104-106, 114, 115.

18A Am. Jur. 2d, Corporations §§ 179, 185, 199, 201, 207, 491.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30 (“notice” and “knowledge” of a fact defined).

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:123, 8:125 (duty to register).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2881 et seq. (duty of inquiry).

CJS. 18 C.J.S., Corporations § 275.

§ 75-8-404. Wrongful registration.

(a) Except as otherwise provided in Section 75-8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) Pursuant to an ineffective indorsement or instruction;

(2) After a demand that the issuer not register transfer became effective under Section 75-8-403(a) and the issuer did not comply with Section 75-8-403(b);

(3) After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) By an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer’s liability to provide the person with a like security is governed by Section 75-8-210.

(c) Except as otherwise provided in subsection (a) or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction.

SOURCES: Laws, 1996, ch. 468 § 38, eff from and after July 1, 1996.

Editor’s Note — Former § 75-8-404 [Codes, 1942, § 41A:8-404; Laws, 1966, ch. 316, § 8-404; 1990, ch. 384, § 40, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor’s Note preceding § 75-8-101.

Cross References — Rights and duties as to registration of securities, see §§ 75-8-401 et seq.

Assurance that indorsements are effective, see § 75-8-402.

Lost, destroyed and stolen securities, see § 75-8-405.

Notice to authenticating trustee, transfer agent, registrar, etc., see § 75-8-406.

JUDICIAL DECISIONS

1. In general.

In action against stock transfer agent for erroneously reissuing, in SEC Rule 144 sale transaction, plaintiff's stock in street name of plaintiff's broker rather than plaintiff's name, where (1) plaintiff, who wished to sell 6,571 shares of unregistered common stock in specified corporation, approached his broker to arrange for such sale pursuant to SEC Rule 144 and signed a "Form 144" and an "assignment separate from certificate," (2) broker without plaintiff's knowledge imprinted its own name in unfilled space for name of assignee of such assignment, (3) broker then mailed plaintiff's stock certificates and "assignment separate from certificate" to defendant transfer agent, together with cover letter requesting that agent reissue new, unlegended certificates in plaintiff's name, (4) transfer agent thereupon reissued single, unlegended certificate in name of plaintiff's broker instead of plaintiff, (5) broker subsequently became bankrupt, and (6) plaintiff failed to recover 1,344 of such shares because of their being commingled with other securities of broker that were held in its street name, court held that under UCC § 8-406, providing that liability of stock transfer agent is same as that of issuer, and UCC § 8-404, providing that issuer is not liable to owner who suffers loss as result of registration of transfer of security if issuer was under no duty to inquire into "adverse claims," defendant transfer agent was not liable for negligence or breach of fiduciary obligation to plaintiff because broker's cover letter to defendant, requesting reissuance of the stock in plaintiff's name, was not an "adverse claim" by the plaintiff or notice of an adverse claim to such stock, and the transfer transaction posed no apparent threat to plaintiff's ownership interest therein. *Cohen v. Bankers Trust Co.*, 445 F. Supp. 794 (S.D.N.Y. 1978).

Where broker purchased 1,000 shares of stock for customer who paid full purchase price therefor, issuer issued ten certificates for 100 shares each in customer's name and delivered certificates to broker, broker using stock powers bearing forged

signatures sold shares to bona fide purchaser, forged signatures were guaranteed by bank which had no knowledge of broker's fraudulent conversion of shares and receipt of proceeds of sale thereof, and issuer issued new certificates to bona fide purchaser, (1) issuer was liable to customer under UCC § 8-311 for registering transfer of customer's shares on unauthorized indorsement, and (2) issuer under UCC § 8-404 was required to issue new certificates to customer. *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569 (3d Cir. Pa. 1977).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law of Rhode Island, plaintiff alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent: (1) under UCC § 8-102 transfer of stock certificates by transfer agent of issuer was investment security transaction within contemplation of Article 8 of UCC, and under UCC § 8-106 rights and duties of issuer with respect to such transfer were governed by law, including conflicts of laws rules, of jurisdiction of organization of issuer, i.e., Rhode Island; (2) since Rhode Island conflicts of laws rules made Oklahoma statute of limitations applicable and since plaintiff's action to enforce liability of corporation for improper registration of her stock under UCC § 8-311 was not limited by any specific provision of Oklahoma statute of limitations, it was limited by general provision providing five year limitation period for actions not otherwise provided for in statute. *Reinhard v. Textron, Inc.*, 516 P.2d 1325 (Okla. 1973).

Proof of ownership is prerequisite to maintenance of action against corporation for wrongful registration of stock certificate. *Lanning v. Poulsbo Rural Tel. Ass'n*, 8 Wash. App. 402, 507 P.2d 1218 (1973).

Reasonable notice was given by 94-year-old lady to issuer of stock that stock had been stolen, so that issuer was obligated under UCC § 8-405 to issue new stock certificate to replace that which had been stolen; under applicable law, lady could

not elect to take cash in lieu of issuance of her shares of stock under UCC § 8-404. *Weller v. AT & T*, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Rights, duties, and liability of corporation in connection with transfer of stock of infant or incompetent. 3 A.L.R.2d 881.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate, on ground of knowledge or suspicion of conflicting rights of registered holder or third person. 25 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 78, 83, 87, 107, 115, 117.

18 Am. Jur. 2d, Corporations §§ 177-197, 207, 268, 463, 473, 496, 484-486, 1145.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:81-8:57.

CJS. 18 C.J.S., Corporations §§ 278-281.

19 C.J.S., Corporations §§ 669 et seq.

§ 75-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

- (1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;
- (2) Files with the issuer a sufficient indemnity bond; and
- (3) Satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by Section 75-8-210. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

SOURCES: Laws, 1996, ch. 468 § 39, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-405 [Codes, 1942, § 41A:8-405; Laws, 1966, ch. 316, § 8-405; 1990, ch. 384, § 41, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Assurance that indorsements are effective, see § 75-8-402.

Issuer's limited duty of inquiry, see § 75-8-403.

Issuer's liability for registration, see § 75-8-404.

Liability for registration, see § 75-8-404.

JUDICIAL DECISIONS

1. In general.

Under the statute, the “issuer shall” provide new securities to replace the lost ones if a “sufficient indemnity bond” is presented and if any other reasonable requirements are met. *First Southwest Corp. v. Lampton*, 724 So. 2d 988 (Ct. App. 1998).

A court can not order a corporation to issue replacement shares if the stockholder has failed to comply with the statute; the statute is the sole means to pursue replacement. *First Southwest Corp. v. Lampton*, 724 So. 2d 988 (Ct. App. 1998).

The deposit of stocks into the registry of the court is not a bond within the meaning of the statute. *First Southwest Corp. v. Lampton*, 724 So. 2d 988 (Ct. App. 1998).

In action seeking replacement from corporations of securities as to which defendants had allegedly improperly registered transfers on forged indorsements: (1) trial court erred in applying provisions of UCC § 8-105, that signatures on securities were “presumed to be genuine or authorized”, where evidence was overwhelming that signatures were forged in furtherance of scheme by third parties, who had stolen certificates, to negotiate stock to others; (2) trial court also erred in finding that plaintiffs were “otherwise precluded” under UCC § 8-311, from asserting an effectiveness of transfers where, other than separate finding that plaintiffs were precluded from recovery by unreasonable delay in notifying issuers, record contained no evidence of conduct by the plain-

tiffs that would preclude recovery; (3) trial court’s findings were inadequate on issue whether plaintiffs had notified issuers as to missing securities “within a reasonable time”, as required by UCC § 8-405, after they had notice certificates were missing, where, though evidence amply supported court’s finding as to date plaintiffs had notice of loss, it did not support further findings that letter sent to defendants some 41 days later was insufficient to notify them of loss, and that more than another month elapsed before adequate notice was given, and where court made no finding as to whether 41-day delay was unreasonable. *Ibanez v. Farmers Underwriters Ass’n*, 14 Cal. 3d 390, 534 P.2d 1336 (1975).

Judgment creditor who purchased shares of stock at sheriff’s sale was not “bona fide purchaser” under UCC § 8-302 since she was not “purchaser” and did not take by “delivery”; therefore, she was not entitled to registration of transfer under UCC § 8-405 where securities had previously been lost and replaced by issuer. *Mazer v. Williams Bros. Co.*, 461 Pa. 587, 337 A.2d 559, 88 A.L.R.3d 942 (1975).

Reasonable notice was given by 94-year-old lady to issuer of stock that stock had been stolen, so that issuer was obligated under UCC § 8-405 to issue new stock certificate to replace that which had been stolen; under applicable law, lady could not elect to take cash in lieu of issuance of her shares of stock under UCC § 8-404. *Weller v. AT & T*, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Statutory requirements respecting replacement of lost stock certificates as applicable to foreign corporations. 8 A.L.R.2d 1198.

Necessity in prosecution under 18 USCA § 2314 for interstate transportation of securities obtained by fraud that specific securities have moved in interstate commerce. 48 A.L.R. Fed. 570.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 115, 117.

18 Am. Jur. 2d, Corporations §§ 198, 199, 263, 311, 350, 353, 467.

52 Am. Jur. 2d, Lost and Destroyed Instruments §§ 3 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:141 (lost, destroyed, or stolen certificates).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2851 et seq. (investment securities: lost, destroyed, or stolen certificates).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2891 et seq. lost (de-

stroyed, and stolen securities).

CJS. 18 C.J.S., Corporations § 176.

§ 75-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under Section 75-8-404 or a claim to a new security certificate under Section 75-8-405.

SOURCES: Laws, 1996, ch. 468 § 40, eff from and after July 1, 1996.

Editor's Note — Former § 75-8-406 [Codes, 1942, § 41A:8-406; Laws, 1966, ch. 316, § 8-406; 1990, ch. 384, § 42, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

JUDICIAL DECISIONS

1. In general.

Absence of compliance with notice requirement under UCC Article 9 foreclosure sale would not act as bar to recovery of deficiency judgment but created rebuttable presumption that value of collateral equaled amount of debt and placed on secured party burden of proving that fair market value of goods sold was less than amount of debt. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Letter by stockholder's attorney several months after discovery that stock was missing from safe deposit box requesting that stockholder be advised in writing whether issuer showed any change in ownership status of stock did not constitute implied notice as defined under UCC § 1-201(25) that stock had been lost, apparently destroyed or wrongfully taken; thus, stockholder was precluded from taking any action against issuer under UCC § 8-405 when issuer subsequently registered transfer of stock before receiving any such notice that stock had been lost, apparently destroyed or wrongfully taken. *Exxon Corp. v. Raetzer*, 533 S.W.2d 842

(Tex. Civ. App. 1976), writ ref'd n.r.e., (June 9, 1976).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. *Hollywood Nat'l Bank v. IBM*, 38 Cal. App. 3d 607 (2d Dist. 1974).

Bona fide purchaser for value of stolen securities endorsed in blank has right to have securities registered in his name when presented to issuer. *United States v. Weinberg*, 345 F. Supp. 824 (E.D. Pa.

1972), *aff'd in part, rev'd on other grounds*, 478 F.2d 1351 (3d Cir. Pa. 1973), *cert. denied*, 414 U.S. 1005, 94 S. Ct. 363, 38 L. Ed. 2d 242 (1973), *cert. denied*, 414 U.S. 1005, 94 S. Ct. 364, 38 L. Ed. 2d 242 (1973).

Where corporations wrongfully transferred stock upon forged signatures of the plaintiff trustee, in November of 1962,

and notice of the illegal transfers reached the plaintiff trustee in July of 1963, § 8-405 of the Uniform Commercial Code would not be applied prospectively to bar the plaintiff trustee's cause of actions against the corporations by estopping her from asserting the ineffectiveness of the forged indorsement. *Scovenna v. AT & T Co.*, 54 Misc. 2d 74 (1967).

§ 75-8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

SOURCES: Laws, 1996, ch. 468 § 41, *eff from and after July 1, 1996*.

Editor's Note — Former § 75-8-407 [Laws, 1990, ch. 384, § 43, *eff from and after July 1, 1990*] was repealed by Laws, 1996, ch. 468, § 71, *eff from and after June 30, 1996*.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effect of signature of authenticating trustee, registrar, or transfer agent, see § 75-8-208.

Effect of guaranteeing signature or indorsement, see § 75-8-306.

Duty of issuer to register transfer, see § 75-8-401.

Assurance that indorsements are effective, see § 75-8-402.

Limited duty of inquiry, see § 75-8-403.

Liability and non-liability for registration, see § 75-8-404.

Lost, destroyed, and stolen securities, see § 75-8-406.

JUDICIAL DECISIONS

1. In general.

A transfer agent for an issuer of securities has the same obligation to a holder or owner of securities as an issuer. *Moore v. Union Planters Corp.*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 1063 (N.D. Miss. Jan. 18, 2000).

In action against stock transfer agent for erroneously reissuing, in SEC Rule 144 sale transaction, plaintiff's stock in street name of plaintiff's broker rather than plaintiff's name, where (1) plaintiff, who wished to sell 6,571 shares of unregistered common stock in specified corporation, approached his broker to arrange for such sale pursuant to SEC Rule 144 and

signed a "form 144" and an "assignment separate from certificate," (2) broker without plaintiff's knowledge imprinted its own name in unfilled space for name of assignee of such assignment, (3) broker then mailed plaintiff's stock certificates and "assignment separate from certificate" to defendant transfer agent, together with cover letter requesting that agent reissue new, unlegended certificates in plaintiff's name, (4) transfer agent thereupon reissued single, unlegended certificate in name of plaintiff's broker instead of plaintiff, (5) broker subsequently became bankrupt, and (6) plaintiff failed to recover 1,344 of such shares

because of their being commingled with other securities of broker that were held in its street name, court held that under UCC § 8-406, providing that liability of stock transfer agent is same as that of issuer, and UCC § 8-404, providing that issuer is not liable to owner who suffers loss as result of registration of transfer of security if issuer was under no duty to inquire into "adverse claims," defendant transfer agent was not liable for negligence or breach of fiduciary obligation to plaintiff because broker's cover letter to defendant, requesting reissuance of the stock in plaintiff's name, was not an "adverse claim" by the plaintiff or notice of an adverse claim to such stock, and the transfer transaction posed no apparent threat to plaintiff's ownership interest therein. *Cohen v. Bankers Trust Co.*, 445 F. Supp. 794 (S.D.N.Y. 1978).

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and precluded summary judgment in their favor. *DeWitt v. American Stock Transf. Co.*, 440 F. Supp. 1084 (S.D.N.Y. 1977).

Under UCC §§ 8-401 and 8-406, bank, acting as transfer agent for corporation's

stock, was not jointly or severally liable with corporation for its refusal on corporation's instructions to remove restrictions from shares belonging to former employee of corporation; bank's refusal to remove restrictive legends from employee's shares did not qualify as refusal to "register a transfer" under terms of § 8-401 so as to subject bank to liability under § 8-406; removal of legend was obvious first step in, and necessary incident to contemplated transfer of stock, but was not equivalent of registration of transfer, and thus, bank retained its common law immunity against suits by injured shareholders; bank, as transfer agent, faced with former employee's request and corporation's order, was not required to determine whether former employee's demotion or discharge entitled him to release of restrictions on his shares and incur thereby full liability should court, after litigation and opportunity for deliberation, rule against bank's decision. *Steranko v. Infores, Inc.*, 5 Mass. App. Ct. 253, 362 N.E.2d 222 (1977).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. *Hollywood Nat'l Bank v. IBM*, 38 Cal. App. 3d 607 (2d Dist. 1974).

Defendant-bank, as transfer agent for bankrupt corporation, was not liable to plaintiff-owners of "legended" investment stock in corporation under UCC §§ 8-401 and 8-406 for wrongful refusal to remove restrictive legends from plaintiff's shares,

resulting in plaintiffs' inability to sell them prior to corporation's bankruptcy; although UCC has abrogated common-law immunity of transfer agents for mere "nonfeasance" (such as failure to act to remove legends) in suits brought by wrongfully injured shareholders, and assuming that plaintiffs' request for removal of legends was substantial equivalent of "request to register transfer" under UCC § 8-401 where restrictive legend expressly required "opinion of counsel" prior to transfer that registration of securities was not required and plaintiffs failed to tender such "opinion of counsel," their requests for transfer were not "rightful" under UCC § 8-401, and consequently bank had no duty to remove legends and issue new unrestricted certificates. *Kenler v. Canal Nat'l Bank*, 489 F.2d 482 (1st Cir. Me. 1973).

This section is substantive and does not constitute a conflict of laws rule. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

The proper construction of § 8-406 dictates that the obligations of a transfer agent are the same as that of the issuer,

and the net effect of § 8-106 and § 8-406 is to establish that the issuer and any of its transfer agents have equal obligations to security holders, regardless of which state's law is applicable to the case. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

Paragraph (b) should be read in conjunction with paragraph (a), and when this is done, it is apparent that the intent of the entire subsection (1) is to equate the obligation of the transfer agent toward the holder of a security with that of the obligation of the issuer. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

An investment company was not entitled to summary judgment in its action against the issuer of stock and its transfer agent to compel the transfer of stock and for damages for the wrongful refusal to transfer where the investment company's status as a bona fide purchaser without notice was in dispute. *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 78, 110, 111, 116.

18A Am. Jur. 2d, Corporations §§ 185, 186, 190, 203, 251, 349, 507, 508.

18B Am. Jur. 2d, Corporations §§ 1536, 1541.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22 (instruction to

jury; effect of unauthorized signature on issue).

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:122 (duty to register).

CJS. 18 C.J.S., Corporations § 277.

§ 75-8-408. Repealed.

Repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.
[Laws, 1990, ch. 384, § 44]

Editor's Note — Former § 75-8-408 was entitled: Delivery of written statement after registration of transfer of uncertificated security; form; time requirements.

For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

PART 5.

SECURITY ENTITLEMENTS.

SEC.

- 75-8-501. Securities account; acquisition of security entitlement from securities intermediary.
- 75-8-502. Assertion of adverse claim against entitlement holder.
- 75-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.
- 75-8-504. Duty of securities intermediary to maintain financial asset.
- 75-8-505. Duty of securities intermediary with respect to payments and distributions.
- 75-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.
- 75-8-507. Duty of securities intermediary to comply with entitlement order.
- 75-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.
- 75-8-509. Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.
- 75-8-510. Rights of purchaser of security entitlement from entitlement holder.
- 75-8-511. Priority among security interests and entitlement holders.

§ 75-8-501. Securities account; acquisition of security entitlement from securities intermediary.

(a) "Securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e), a person acquires a security entitlement if a securities intermediary:

(1) Indicates by book entry that a financial asset has been credited to the person's securities account;

(2) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement.

SOURCES: Laws, 1996, ch. 468, § 42, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-502. Assertion of adverse claim against entitlement holder.

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement under Section 75-8-501 for value and without notice of the adverse claim.

SOURCES: Laws, 1996, ch. 468, § 43, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in Section 75-8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under Sections 75-8-505 through 75-8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against a purchaser of the financial asset or interest therein only if:

(1) Insolvency proceedings have been initiated by or against the securities intermediary;

(2) The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) The securities intermediary violated its obligations under Section 75-8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) The purchaser is not protected under subsection (e).

The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a), whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under Section 75-8-504.

SOURCES: Laws, 1996, ch. 468, § 44, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-504. Duty of securities intermediary to maintain financial asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

SOURCES: Laws, 1996, ch. 468, § 45, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-505. Duty of securities intermediary with respect to payments and distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

SOURCES: Laws, 1996, ch. 468, § 46, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 47, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-507. Duty of securities intermediary to comply with entitlement order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

SOURCES: Laws, 1996, ch. 468, § 48, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

- (1) The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or
- (2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 49, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-509. Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.

(a) If the substance of a duty imposed upon a securities intermediary by Sections 75-8-504 through 75-8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by Sections 75-8-504 through 75-8-508 is subject to:

(1) Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) Rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Sections 75-8-504 through 75-8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

SOURCES: Laws, 1996, ch. 468, § 50, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-510. Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c), an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under Section 75-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Chapter 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d), purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under Section 75-8-106(d)(1);

(2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under Section 75-8-106(d)(2); or

(3) If the purchaser obtained control through another person under Section 75-8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

SOURCES: Laws, 1996, ch. 468, § 51; Laws, 2001, ch. 495, § 22, eff from and after Jan. 1, 2002.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Amendment Notes — The 2001 amendment, effective January 1, 2002, added "In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c)" at the beginning of (a); in the second sentence of (c), inserted "Except as otherwise provided in subsection (d)," and substituted "according to the priority in time of:" for "equally, except that"; added (c)(1) through (c)(3); and redesignated the former language at the end of the second sentence in (c) as (d).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 118, 119.

§ 75-8-511. Priority among security interests and entitlement holders.

(a) Except as otherwise provided in subsections (b) and (c), if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

SOURCES: Laws, 1996, ch. 468, § 52, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of prior Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

CHAPTER 9

Uniform Commercial Code—Secured Transactions

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Editor's Note — Laws, 2001, ch. 495, §§ 1 and 2, effective January 1, 2002, repealed the sections formerly codified as Chapter 9 [UCC Article 9] and enacted a revised Chapter 9 [UCC Revised Article 9].

The following tables of disposition list the provisions of UCC Article 9 and other Code sections as they existed prior to January 1, 2002, and the corresponding provisions in UCC Revised Article 9, effective January 1, 2002. These tables are intended to assist the user who is familiar with the former Article 9 in finding comparable new provisions in Revised Article 9. In addition, where appropriate, the Source lines from the former provisions have been retained in the new provisions.

These tables were prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Law as part of Revised Article 9.

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9-103(4)	9-301
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9-108	Omitted as no longer needed
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TABLE INDICATING SOURCES OR DERIVATIONS OF NEW ARTICLE 9 SECTIONS
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9-103	9-107
9-104(New)	Derived from 8-106
9-105(New)	Derived from 8-106
9-106	8-106 and 9-115(e)
9-107(New)	Derived from 8-106
9-108	9-110, 9-115(3)
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TRADE, COMMERCE, INVESTMENTS

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9-209(New)	
9-210	9-208
9-301	9-103(1)(a),(b),9-103(3)(a),(b),9-103(4)9-103(5) substantially modified
9-302(New)	
9-303	9-103(2)(a),(b),substantially revised
9-304(New)	Derived in part from 8-110(e) and 9-305 and former 9-103(6)
9-305	9-103(6)
9-306(New)	Derived in part from 8-110(e) and 9-305 and former 9-103(6)
9-307	9-103(3)(d), as substantially revised
9-308	9-303,9-115(2)
9-309	9-302(1),9-115(4)(c),(d)9-116
9-310	9-302(1),(2)
9-311	9-302(3),(4)
9-312	9-115(4) and 9-304, with additions and some changes
9-313	9-305, 9-115(6)
9-314(New in part)	9-115(4) and derived from 8-106
9-315	9-306
9-316	9-103(1)(d), (2)(b),(3)(e), as modified
9-317	9-301, 2A-307(2)
9-318(New)	
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9-320	9-307
9-321	2A-103(1)(o), 2A-307(3)
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9-323	9-312(7),9-301(4),9-307(3),2A-307(4)
9-324	9-312(3),(4)
9-325(New)	But see 9-402(7)
9-326(New)	But see 9-402(7)
9-327	Derived from 9-115(5)
9-328	9-115(5)
9-329(New)	Loosely modeled after former 9-115(5). See also 5-114 and 5-118
9-330	9-308
9-331	9-309
9-332(New)	But see Comment 2(c) to 9-306
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9-334	9-313
9-335(New)	Section replaces former 9-314
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9-337	Derived from 9-103(2)(d)
9-338(New)	
9-339	9-316
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9-341(New)	
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UCC—SECURED TRANSACTIONS

NEW ARTICLE 9

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 9-510(New)
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 9-516(Basically New)

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 9-518(New)
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 See also 5-114
 Derived from former 9-401
 9-402(1),(5),(6)
 Subsection(a)(4),(b) and (c) derive from
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 But see 9-402(7)

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 9-403(2),(3),(6)
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 remainder is new

 9-403(4),(7);9-405(2)

 9-403(3), revised substantially
 9-407; subsections (d) and (e) are new
 Derived from 4-109
 Various sections of former Part 4
 Subsection (b) derives in part from the
 Uniform Consumer Credit Code (1974)
 Derived in part from the Uniform
 Consumer Credit Code (1974)
 9-501(1),(2),(5)
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TRADE, COMMERCE, INVESTMENTS

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9-618	9-504(5)
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9-621	9-505
9-622(New)	
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9-624	9-504(3),9-505,9-506
9-625	9-507
9-626(New)	
9-627	9-507(2)
9-628(New)	
9-701	No comparable provision in Article 9 (See Article 10)
9-702	No comparable provision in Article 9 (See Article 10)
9-703	No comparable provision in Article 9 (See Article 10)
9-704	No comparable provision in Article 9 (See Article 10)
9-705	No comparable provision in Article 9 (See Article 10)
9-706	No comparable provision in Article 9 (See Article 10)
9-707	No comparable provision in Article 9 (See Article 10)

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PART 1.

GENERAL PROVISIONS.

Subpart 1.	Short Title, Definitions, and General Concepts.....	75-9-101
Subpart 2.	Applicability of Article.....	75-9-109

Editor’s Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under “Judicial Decisions” were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

SUBPART 1.

SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS.

SEC.	
75-9-101.	Short title.
75-9-102.	Definitions and index of definitions.

- 75-9-103. Purchase-money security interest; application of payments; burden of establishing.
- 75-9-103A. “Production-money crops”; “production-money obligation”; production-money security interest; burden of establishing.
- 75-9-104. Control of deposit account.
- 75-9-105. Control of electronic chattel paper.
- 75-9-106. Control of investment property.
- 75-9-107. Control of letter-of-credit right.
- 75-9-108. Sufficiency of description.

§ 75-9-101. Short title.

This article may be cited as Uniform Commercial Code — Secured Transactions.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Rights of secured party or lienholder in forfeiture proceedings pursuant to alcoholic beverage control law, see §§ 67-1-93, 67-1-95.

Disbursement of proceeds to bona fide lienholders, secured parties, or other interested parties following public auction of forfeited property under alcoholic beverage control law, see § 67-1-97.

Comparable Laws from other States — Alabama Code, §§ 7-9-101 et seq.

Arkansas Code Annotated, §§ 4-9-101 et seq.

Georgia Code Annotated, §§ 11-9-101 et seq.

Louisiana Revised Statutes Annotated, §§ 10:9-101 et seq.

Tennessee Code Annotated, §§ 47-9-101 et seq.

Texas Business and Commerce Code, § 9.101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

- 1.-5. [Reserved for future use.]

II. Under former § 75-9-101.

- 6. In general; relationship to other laws.
- 7. Notice of public sale.
- 8. Priority rights.
- 9. Conditional sales.
- 10. Construction contracts.
- 11. Leases.
- 12. —Leases intended as security.
- 13. Real estate contracts.
- 14. Sale of accounts or chattel paper.
- 15. Security interest.
- 16. —Created by contract.
- 17. Surety.
- 18. —Subrogation by surety.
- 19. Trust receipts.

I. Under Current Law.

- 1.-5. [Reserved for future use.]

II. Under former § 75-9-101.

- 6. In general; relationship to other laws.

Repossession and disposition procedures used by secured party did not comply with those provided in Article 9 of UCC where, after repossessing automobiles, notice of sale was sent by registered mail to each defaulting purchaser advising him that his car would be sold at public auction to highest bidder on specified date for not less than specified minimum amount, where only public notice of sale was blackboard placed in office of secured party listing date of sale, initials of defaulting purchaser, and year and make of automobile, where secured party

did not conduct sale at public auction, as stated in notice of sale, but on date of sale credited debtor's account with minimum price stated in notice of sale and then proceeded to collect deficiency by taking judgment on cognovit notes signed by debtors, and where secured party then obtained repossession titles for automobiles involved and resold them from its used car lot, at retail, to other consumers at substantially higher prices than amounts credited. Although UCC § 9-505(2) authorizes secured party in possession of repossessed goods to retain those goods in satisfaction of debtor's obligations, provided written notice of such intention is sent to debtor and debtor does not object within 30 days, and although debtors in present case made no objection to proceedings, secured party did not comply with provisions of UCC § 9-504 and, thus, was not entitled to deficiency judgment as permitted under UCC § 9-504(2). *Miles v. N.J. Motors, Inc.*, 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975).

7. Notice of public sale.

Under UCC § 6-103(3) [Repealed], public liquidation sale of debtor's inventory by federal Small Business Administration was not subject to provisions of UCC Article 6 dealing with bulk transfers (UCC § 6-101 et seq. [Repealed]), but was governed by UCC Article 9 dealing with secured transactions (UCC § 9-101 et seq.). *United States ex rel. Small Bus. Admin. v. Gore*, 437 F. Supp. 344 (E.D. Pa. 1977) (applying Pennsylvania law).

Under provisions of consumer credit act prohibiting use of negotiable instruments in consumer credit transactions, instrument entitled "Retail Installment Agreement (Security Interest)," although it contained necessary elements of negotiable instrument set out in UCC § 3-104, was not negotiable instrument, but was retail installment contract and security agreement subject to provisions of Article 9 of UCC, where instrument was drawn by creditor regulated by consumer credit act and contained matters required by consumer credit act, and where bulk of its terms provided for retention of title and preservation of purchase money security interest as prescribed by Article 9. *Jefferson v. Mitchell Select Furn. Co.*, 56

Ala. App. 259, 321 So. 2d 216 (Civ. App. 1975).

Where secured party sold automatic truck and trailer washer to company which operated "truck stop" business and retained purchase money security interest therein, where debtor company sold truck stop business to transferee, but excluded from sale automatic truck and trailer washer, where debtor company subsequently defaulted and secured party foreclosed on its security interest in washer pursuant to Article 9 of UCC, and where secured party then sought to recover deficiency from transferee under provisions of Article 6: (1) secured creditor was entitled to benefits of Article 6 of Uniform Commercial Code relating to bulk transfers, and was not limited solely to remedies provided in Article 9 relating to secured transactions; (2) fact that no notice was given to secured party as is required by UCC § 6-105, although bulk transfer provisions of UCC were otherwise substantially complied with and transferee knew that secured party was creditor of debtor company, would ordinarily render transfer ineffective as to secured party; (3) however, material issue of fact existed as to whether truck stop business was enterprise whose "principal business is the sale of merchandise from stock," as provided in UCC § 6-102(3), and thus subject to bulk transfer provisions of UCC. *Automatic Truck & Trailer Wash Ctrs., Inc. v. Eastamp, Inc.*, 320 So. 2d 7 (Fla. App. 1975).

8. Priority rights.

Exclusion from Uniform Commercial Code, Article 9 protection means that the claimant to a right of set-off is not precluded from this right merely because another claimant to the security has perfected its interest in the security by taking possession of it. The right of set-off is separate from the priority provisions of Article 9. *Bank of Crystal Springs v. First Nat'l Bank*, 427 So. 2d 968 (Miss. 1983).

Where financing statements filed with secretary of state alone and not filed locally did not protect security interest, lien creditor had priority over holder of security interests. *Package Mach. Co. v. Cosden Oil & Chem. Co.*, 51 A.D.2d 771 (2d Dep't 1976).

9. Conditional sales.

Provision in security agreement executed on purchase of new automobile which provided that until indebtedness was fully paid, "seller has and shall retain title to and a security interest in the property" did not violate federal Truth-in-Lending Act and Regulation Z, since (1) Uniform Commercial Code, in UCC § 1-201(37), now provides universal definition of term "security interest," (2) Uniform Commercial Code was designed to replace confusingly numerous security devices that prevailed under pre-Code practice, and (3) it would therefore be anomalous and counterproductive of UCC objectives to interpret Regulation Z, which requires disclosure of "type of any security interest held," as requiring lender to specify particular security device employed. In such case, it was sufficient that security agreement in issue contained reference to a "security interest" in property described in the agreement that was enforceable under the Uniform Commercial Code, and statement in the agreement that seller retained "title" to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender's disclosure statement confusing or misleading. *Drew v. Flagship First Nat'l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977) (construing Florida law).

Bankruptcy judge was justified in holding that purported lease transaction was conditional sale, that contract executed by bankrupt and typewriter dealer whereby bankrupt agreed to pay \$15.00 per month for 22 month term and was given option to purchase typewriter for \$6.55 at end of term was security interest required by UCC to be filed, and that, in view of absence of filing, title to machine vested in bankruptcy trustee, where it was clear that transaction was understood to be sale by both bankrupt and by typewriter dealer's employees who dealt with him; among other things, bankrupt came to dealer's place of business to buy typewriter, dealer intended to sell him typewriter, and so-called "lease-ownership" contract was used because bankrupt preferred it. In *re Shell*, 390 F. Supp. 273 (E.D. Ark. 1975) (applying Arkansas law).

10. Construction contracts.

Subcontractor protected under mechanics' lien trust statute prevailed over lending bank's prior perfected security interest in general contractor's accounts receivable where bank failed to establish whether, and to what extent, general contractor used loan proceeds to pay subcontractor. *National Bank v. Eames & Brown, Inc.*, 396 Mich. 611, 242 N.W.2d 412 (1976).

Although bank had perfected security interest in all present and future accounts receivable of contractor in accord with UCC Article 9 prior to time contractor entered into construction contract, where contractor entered into subcontract and subcontractor furnished material and services for project, and where funds owed to contractor under prime contract were paid directly to subcontractor pursuant to statute which created trust fund for benefit of subcontractors and materialmen under private construction contracts, bank was not entitled to recover such funds except to extent money provided by bank was in fact used to pay laborers, subcontractors or materialmen on specific job in question. *National Bank v. Eames & Brown, Inc.*, 396 Mich. 611, 242 N.W.2d 412 (1976).

11. Leases.

Lease of radio equipment for five years at agreed price, with title to property remaining in lessor and with possession of equipment to be returned to lessor at expiration of lease, did not constitute "security interest"; thus, Article 9 of Code did not apply and parties' conduct was governed by terms of lease, which did not require sale of equipment upon default, nor crediting proceeds of sale against lessee's indebtedness, but instead provided that upon default lessor could retain all payments made and recover full unpaid balance of term rental. *McGuire v. Associates Capital Servs. Corp.*, 133 Ga. App. 408, 210 S.E.2d 862 (1974).

12. —Leases intended as security.

Automobile lease transaction which in effect required lessee to purchase vehicle at prearranged price on termination of lease, and which conferred on lessee full benefit of actual sale price of vehicle when it was sold on wholesale market pursuant

to terms of lease, was sufficiently analogous to secured sale to subject transaction to provisions of UCC Art 9. *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 235 S.E.2d 752 (1977), opinion after remand from supreme court, 144 Ga. App. 312, 241 S.E.2d 31 (1977).

Notwithstanding language of "lease-purchase agreement," it was clear that credit corporation and purported lessee of dump truck contemplated entering into secured transaction under UCC § 9-101 et seq. where financing statement listed credit corporation as secured party and purported lessee as debtor, and covered dump truck as secured item, where motor vehicle certificate of ownership listed purported lessee as owner and credit corporation as secured party and where purported lessee had option under "lease" to purchase truck for one dollar after making all installment payments. *GECC v. Castiglione*, 142 N.J. Super. 90, 360 A.2d 418 (1976).

Bankruptcy judge was justified in holding that purported lease transaction was conditional sale, that contract executed by bankrupt and typewriter dealer whereby bankrupt agreed to pay \$15.00 per month for 22 month term and was given option to purchase typewriter for \$6.55 at end of term was security interest required by UCC to be filed, and that, in view of absence of filing, title to machine vested in bankruptcy trustee, where it was clear that transaction was understood to be sale by both bankrupt and by typewriter dealer's employees who dealt with him; among other things, bankrupt came to dealer's place of business to buy typewriter, dealer intended to sell him typewriter, and so-called "lease-ownership" contract was used because bankrupt preferred it. *In re Shell*, 390 F. Supp. 273 (E.D. Ark. 1975).

Lease of airplane with option to purchase would be regarded as secured transaction, subject to provisions of UCC Article 9 relating to default and repossession of collateral, where total monthly payment required, plus downpayment and option payment, approximately equalled originally agreed value of \$22,000 for airplane and where \$100 purchase option was nominal. *Kupka v. Morey*, 541 P.2d 740 (Alaska 1975).

13. Real estate contracts.

UCC § 9-104(j) provides that UCC Art 9 does not apply to creation or transfer of interest in real estate, including lease or rents thereunder. Thus, in action by assignee of right to receive royalties and rent payments arising from lease of rock quarry against judgment lien creditors of assignor of such right and garnishees in possession of such rents and royalties, rents and royalties in garnishees' possession were not subject to UCC Art 9, and judgment lien creditors were not prohibited by UCC § 9-301 from taking priority to such funds over assignee who had unperfected security interest in funds, even though judgment lien creditors had knowledge of assignee's security interest at time they became lien creditors. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 552 S.W.2d 392 (Tenn. Ct. App. 1976).

14. Sale of accounts or chattel paper.

In action for breach of contract under which defendant had agreed to pay plaintiff 50 per cent of all invoices submitted to defendant by one of its suppliers, but where defendant refused to make further payments under contract after it was notified by bank that supplier had previously assigned its accounts receivable to bank, and where defendant filed third party complaint against bank, bank was entitled to summary judgment in its favor and against defendant on third party complaint; bank had fully complied with all applicable provisions of UCC and had perfected security interest in supplier's accounts receivable before defendant entered into agreement with plaintiff and, thus, any rights of plaintiff against defendant or its supplier were subservient and unrelated to bank's rights against supplier. *Rivan Die Mold Corp. v. Stewart-Warner Corp.*, 26 Ill. App. 3d 637, 325 N.E.2d 357 (1st Dist. 1975).

15. Security interest.

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis," where checks were subse-

quently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy, interest of unpaid seller was subordinate to interest of secured creditor, and seller who did not attempt to reclaim cattle until year after filing petition for bankruptcy, was not entitled to either reclamation of cattle or proceeds from sale of slaughtered meat. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976) (applying Texas law).

Secured party possessed perfected security interest within UCC Article 9 and accordingly occupied position of priority over government's tax lien where debtor obtained financing for construction project from secured party, assigned to secured party its contract rights, including right of payment, and prior to tax lien filing, secured party filed financing statement covering its security interest in debtor's contract rights. *B.F. Goodrich Co. v. Simco, Inc.*, 406 F. Supp. 200 (M.D. Ga. 1976) (applying Georgia law).

Article 9 applies only to consensual security interests; thus, since surety's interest, arising in connection with bonding of public work's contractor, was not consensual, but derived from status inherent in being surety, Article 9 did not apply and conflict between rights of surety and secured third party would be resolved without reference to Article 9. *First Vt. Bank & Trust Co. v. Village of Poultney*, 134 Vt. 28, 349 A.2d 722 (1975).

16. —Created by contract.

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packers' assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis" (cattle were first slaughtered, chilled and then graded before purchase price was calculated), where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed

petition in bankruptcy, and cattle sellers sought to reclaim cattle or right to proceeds from sale of slaughtered meat: (1) course of conduct prescribed by Packers and Stockyards Act and regulations issued thereunder, coupled with undisputed intent of cattle sellers, compelled conclusion that sale of cattle was cash and not credit transaction; (2) strict application of ten-day limitation on right to reclaim cattle for some substantial period of time after filing of petition for bankruptcy was warranted inasmuch as such limitation is absolute; (3) however slight or tenuous or marginal was sellers' interest, it was necessarily great enough to permit attachment of secured party's lien; (4) even if evidence had established that secured party knew of meat packer's nonpayment its status as good faith purchaser would be unaffected; and (5) the perfected security interest was superior to the interest of the seller. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976) (applying Texas law).

17. Surety.

Article 9 applies only to consensual security interests; thus, since surety's interest, arising in connection with bonding of public work's contractor, was not consensual, but derived from status inherent in being surety, Article 9 did not apply and conflict between rights of surety and secured third party would be resolved without reference to Article 9. *First Vt. Bank & Trust Co. v. Village of Poultney*, 134 Vt. 28, 349 A.2d 722 (1975).

18. —Subrogation by surety.

Failure of contractor's surety to record indemnity agreement which assigned to surety, in event of contractor's failure to perform, all rights (including right to progress payments) under any future construction contracts that contractor might enter into did not defeat surety's equitable right to subrogation with respect to progress payments earned prior to contractor's default on contract, as against claim to such payments of bank which had recorded, in compliance with Uniform Commercial Code, contractor's earlier assignment to bank of proceeds from such future contracts. Since Uniform Commer-

cial Code protects only contract rights and not rights that arise by operation of law, and since surety's equitable subrogation right arose by operation of law, surety in such case was not required by Uniform Commercial Code to file financing statement to preserve its subrogation right in event of principal's default. *First Alabama Bank v. Hartford Accident & Indem. Co.*, 430 F. Supp. 907 (N.D. Ala. 1977) (applying Alabama law).

Surety on contractor's performance and payment bonds who completed contractor's performance and paid contractor's debts after contractor defaulted was entitled to payments due contractor under contract with United States by doctrine of equitable subrogation, as opposed to contractor's trustee in bankruptcy, notwithstanding surety did not perfect its interest in accord with Article 9 of UCC; doctrine of equitable subrogation in suretyship cases does not create security interest under UCC and has not been displaced or controlled by Article 9. *McAtee v. United States Fid. & Guar. Co.*, 401 F. Supp. 11 (N.D. Fla. 1975) (applying Florida law).

Terms of Uniform Commercial Code do not abrogate, modify, affect or abridge

performing surety's rights under equitable doctrine of subrogation, and subrogation claim thereunder does not lose its priority rank when it is not filed pursuant to requirements of Code. *Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co.*, 531 P.2d 1370 (Okla. 1975).

Sureties, who made performance bond securing contractor's completion of construction project and payment of laborers and materialmen, and who became subrogated to rights of claimants on bond, had priority in contract rights of defaulting contractor as against party having security interest in contractor's accounts receivables who had filed Article 9 financing statement, notwithstanding sureties never filed financing statement. *Stevlee Factors, Inc. v. State*, 136 N.J. Super. 461, 346 A.2d 624 (1975), *aff'd*, 144 N.J. Super. 346, 365 A.2d 713 (1976).

19. Trust receipts.

Article 9 of UCC includes trust receipts and did not abolish them; consequently, guarantee agreement executed by guarantors covered indebtedness of debtor arising out of its trust receipt with creditor. *American Fiber Glass, Inc. v. GECC*, 529 S.W.2d 298 (Tex. Civ. App. 1975).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper. 30 A.L.R.3d 9.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor. 8 A.L.R.4th 1123.

Applicability of Article 9 of Uniform Commercial Code to assignment of rights under real-estate sales contract, lease agreement, or mortgage as collateral for separate transaction. 76 A.L.R.4th 765.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 1 et seq.

Law Reviews. Clement, Jr., Enforcing Security Interests in Personal Property in Mississippi. 67 Miss. L. J. 44, Fall, 1997.

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§ 75-9-102. Definitions and index of definitions.

(a) In this article:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) "Account," except as used in "account for," means a right to payment of a monetary obligation, whether or not earned by performance, (i) for

property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting," except as used in "accounting for," means a record:

(A) Authenticated by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than thirty-five (35) days earlier or thirty-five (35) days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor's farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;

(B) Which is created by statute in favor of a person that:

(i) In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) Leased real property to a debtor in connection with the debtor's farming operation; and

(C) Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) Oil, gas, or other minerals that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals before extraction; and

(ii) Attaches to the minerals as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) To sign; or

(B) To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) The claimant is an organization; or

(B) The claimant is an individual and the claim:

(i) Arose in the course of the claimant's business or profession; and

(ii) Does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) “Commodity contract” means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) “Commodity customer” means a person for which a commodity intermediary carries a commodity contract on its books.

(17) “Commodity intermediary” means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) “Communicate” means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.

(19) “Consignee” means a merchant to which goods are delivered in a consignment.

(20) “Consignment” means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is One Thousand Dollars (\$1,000.00) or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(21) “Consignor” means a person that delivers goods to a consignee in a consignment.

(22) “Consumer debtor” means a debtor in a consumer transaction.

(23) “Consumer goods” means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) “Consumer-goods transaction” means a consumer transaction in which:

(A) An individual incurs an obligation primarily for personal, family, or household purposes; and

(B) A security interest in consumer goods secures the obligation.

(25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in Section 75-7-201(2).

(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products, or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to Section 75-9-519(a).

(37) “Filing office” means an office designated in Section 75-9-501 as the place to file a financing statement.

(38) “Filing-office rule” means a rule adopted pursuant to Section 75-9-526.

(39) “Financing statement” means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) “Fixture filing” means the filing of a financing statement covering goods that are or are to become fixtures and satisfying Section 75-9-502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) “Fixtures” means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) “General intangible” means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(43) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(44) “Goods” means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, (v) farm-raised fish produced in fresh water according to the usual and customary techniques of commercial agriculture, (vi) manufactured homes and (vii) marine vessels (herein defined as every type of watercraft used, or capable of being used, as a means of transportation on water) including both marine vessels under construction, including engines and all items of equipment installed or to be installed therein, whether such vessels are being constructed by the shipbuilder for his own use or for sale (said vessels under construction being classified as inventory within the meaning of Section 75-9-102(48)), and marine vessels after completion of construction so long as such vessels have not become “vessels of the United States” within the meaning of the Ship Mortgage Act of 1920, 46 USCS, Section 911(4), as same is now written or may hereafter be amended (said completed vessels being classified as equipment within the meaning of Section 75-9-102(33)). The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts,

documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided or to be provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary endorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(48) "Inventory" means goods, other than farm products, which:

- (A) Are leased by a person as lessor;
- (B) Are held by a person for sale or lease or to be furnished under a contract of service;
- (C) Are furnished by a person under a contract of service; or
- (D) Consist of raw materials, work in process or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract or commodity account.

(50) "Jurisdiction of organization," with respect to a registered organization, means the jurisdiction under whose law the organization is organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

- (A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;
 - (B) An assignee for benefit of creditors from the time of assignment;
 - (C) A trustee in bankruptcy from the date of the filing of the petition;
- or
- (D) A receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight (8) body feet or more in

width or forty (40) body feet or more in length, or, when erected on site, is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

(54) “Manufactured-home transaction” means a secured transaction:

(A) That creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or

(B) In which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(55) “Mortgage” means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation. “Mortgage” shall mean and include a deed of trust.

(56) “New debtor” means a person that becomes bound as debtor under Section 75-9-203(d) by a security agreement previously entered into by another person.

(57) “New value” means (i) money, (ii) money’s worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) “Noncash proceeds” means proceeds other than cash proceeds.

(59) “Obligor” means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) “Original debtor,” except as used in Section 75-9-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under Section 75-9-203(d).

(61) “Payment intangible” means a general intangible under which the account debtor’s principal obligation is a monetary obligation.

(62) “Person related to,” with respect to an individual, means:

(A) The spouse of the individual;

(B) A brother, brother-in-law, sister, or sister-in-law of the individual;

(C) An ancestor or lineal descendant of the individual or the individual’s spouse; or

(D) Any other relative, by blood or marriage, of the individual or the individual’s spouse who shares the same home with the individual.

(63) "Person related to," with respect to an organization, means:

(A) A person directly or indirectly controlling, controlled by, or under common control with the organization;

(B) An officer or director of, or a person performing similar functions with respect to, the organization;

(C) An officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A);

(D) The spouse of an individual described in subparagraph (A), (B), or (C); or

(E) An individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) and shares the same home with the individual.

(64) "Proceeds," except as used in Section 75-9-609(b), means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange or other disposition of collateral;

(B) Whatever is collected on, or distributed on account of, collateral;

(C) Rights arising out of collateral;

(D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(64A) "Production-money crops" means crops that secure a production-money obligation incurred with respect to the production of those crops.

(64B) "Production-money obligation" means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops.

(64C) "Production of crops" includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, irrigating, harvesting and gathering crops, and protecting them from damage or disease.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Sections 75-9-620, 75-9-621, and 75-9-622.

(67) "Public-finance transaction" means a secured transaction in connection with which:

(A) Debt securities are issued;

(B) All or a portion of the securities issued have an initial stated maturity of at least twenty (20) years; and

(C) The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(68) "Pursuant to commitment," with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(69) "Record," except as used in "for record," "of record," "record or legal title," and "record owner," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(70) "Registered organization" means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.

(71) "Secondary obligor" means an obligor to the extent that:

(A) The obligor's obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(72) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under Section 75-2-401, 75-2-505, 75-2-711(3), 75-2A-508(5), 75-4-210, or 75-5-118.

(73) "Security agreement" means an agreement that creates or provides for a security interest.

(74) "Send," in connection with a record or notification, means:

(A) To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) To cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A).

(75) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program.

The term does not include a computer program that is included in the definition of goods.

(76) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(77) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(78) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(79) "Termination statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(80) "Transmitting utility" means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) The following definitions in other articles apply to this article:

"Applicant" Section 75-5-102.

"Beneficiary" Section 75-5-102.

"Broker" Section 75-8-102.

"Certificated security" Section 75-8-102.

"Check" Section 75-3-104.

"Clearing corporation" Section 75-8-102.

"Contract for sale" Section 75-2-106.

"Customer" Section 75-4-104.

"Entitlement holder" Section 75-8-102.

"Financial asset" Section 75-8-102.

"Holder in due course" Section 75-3-302.

"Issuer" (with respect to
a letter of credit or
letter-of-credit right) Section 75-5-102.

"Issuer" (with respect to a
security) Section 75-8-201.

"Lease" Section 75-2A-103.

"Lease agreement" Section 75-2A-103.

"Lease contract" Section 75-2A-103.

"Leasehold interest" Section 75-2A-103.

“Lessee”	Section 75-2A-103.
“Lessee in ordinary course of business”	Section 75-2A-103.
“Lessor”	Section 75-2A-103.
“Lessor’s residual interest”	Section 75-2A-103.
“Letter of credit”	Section 75-5-102.
“Merchant”	Section 75-2-104.
“Negotiable instrument”	Section 75-3-104.
“Nominated person”	Section 75-5-102.
“Note”	Section 75-3-104.
“Proceeds of a letter of credit”	Section 75-5-114.
“Prove”	Section 75-3-103.
“Sale”	Section 75-2-106.
“Securities account”	Section 75-8-501.
“Securities intermediary”	Section 75-8-102.
“Security”	Section 75-8-102.
“Security certificate”	Section 75-8-102.
“Security entitlement”	Section 75-8-102.
“Uncertificated security”	Section 75-8-102.

(c) Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

SOURCES: Former 1972 Code § 75-9-102 [Codes, 1942, § 41A:9-102; Laws, 1966, ch. 316, § 9-102; Laws, 1977, ch. 452, § 5] is now found in comparable provisions enacted at § 75-9-109 by Laws, 2001, ch. 495, § 1. Present § 75-9-102 was derived from former 1972 Code §§ 75-9-105 [Codes, 1942, § 41A:9-105; Laws, 1966, ch. 316, § 9-105; Laws, 1977, ch. 452, § 8; Laws, 1978, ch. 356, § 1; Laws, 1990, ch. 384, § 48; Laws, 1996, ch. 460, § 23; Laws, 1996, ch. 468, § 57], 75-9-106 [Codes, 1942, § 41A:9-106; Laws, 1966, ch. 316, § 9-106; Laws, 1977, ch. 452, § 9; Laws, 1996, ch. 460, § 24; Laws, 1996, ch. 468, § 58], 75-9-109 [Codes, 1942, § 41A:9-109; Laws, 1966, ch. 316, § 9-109], 75-9-115 [Laws, 1996, ch. 468, § 59], 75-9-301 [Codes, 1942, § 41A:9-301; Laws, 1966, ch. 316, § 9-301; Laws, 1977, ch. 452, § 14; Laws, 1986, ch. 343, § 1; Laws, 1996, ch. 468, § 62], and 75-9-306 [Codes, 1942, § 41A:9-306; Laws, 1966, ch. 316, § 9-306; Laws, 1977, ch. 452, § 18; Laws, 1996, ch. 468, § 67] and was enacted by Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 4, eff from and after passage (approved Mar. 20, 2002.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in subsection (a)(36), as amended by Laws, 2002, ch. 453. The reference to “Section 9-519(a)” was changed to “Section 75-9-519(a).” The Joint Committee ratified the correction at its May 16, 2002 meeting.

Amendment Notes — The 2002 amendment deleted “other than a security interest” following “an interest” in (a)(5); and added “or to be provided” at the end of (a)(46).

Cross References — “Goods” with reference to sales, see § 75-2-105.

Sale of goods that are to be severed from realty, see § 75-2-107.

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I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-105.

A. Decisions Under Uniform Commercial Code.

6. In general.

One who has no interest in property cannot create security interest in it in favor of another under UCC. *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 665 P.2d 661 (1983).

7. "Chattel paper".

A Pennsylvania bailment lease security agreement constitutes chattel paper as defined in subsec. (1)(b). *Associates Dist. Corp. v. Old Freeport Bank*, 421 Pa. 609, 220 A.2d 621 (1966).

8. "Collateral".

"Control and management" of the disposition of funds do not constitute "collateral" under UCC § 9-105(1)(c). *Stockwell v. Bloomfield State Bank*, 174 Ind. App. 307, 367 N.E.2d 42 (1977).

9. "Document".

Assignment of passbook savings account was governed by common law rather than Uniform Commercial Code, inasmuch as UCC § 9-104(1) specifically exempts transfer of interest in deposit account from its coverage and under UCC § 9-105(1)(e), deposit account includes passbook. *Iser Elec. Co. v. Ingran Constr. Co.*, 48 Ill. App. 3d 110, 362 N.E.2d 771 (2d Dist. 1977).

10. "Debtor".

Context of UCC § 9-203 precludes construing "debtor" to mean owner of collateral for purposes of determining who must sign security agreement. *United States Small Bus. Admin. v. Guaranty Bank & Trust Co.*, 874 F.2d 997 (5th Cir. 1989).

In action to determine priority of right to farm equipment (collateral) as between bankruptcy trustee and assignee-creditor with allegedly perfected security interest, where (1) partnership-debtor bought farm equipment from seller on October 25, 1974, (2) seller filed financing statement in Tallahatchie County, Mississippi, instead of Sunflower County, Mississippi, where partnership's property was located, (3) seller subsequently assigned sale contract and security agreement to plaintiff assignee-creditor, and (4) debtor thereafter became bankrupt, court held (1) that partnership can be debtor because (1) UCC § 9-105(1)(d) defines debtor as "person" who owes payment of secured obligation, (b) "person" under UCC § 1-201(30) includes "organization," and (c) "organization" under UCC § 1-201(28) includes "partnership," (2) that debtor-partnership's residence under UCC § 9-401(6) was its place of business, which was in Sunflower County, Mississippi, and not Tallahatchie County, Mississippi, (3) that under UCC § 9-401(1)(a), plaintiff's financing statement should have been filed in county of debtor's residence (Sunflower County), and (4) that as a result, plaintiff's security interest was unperfected because it was filed in wrong county. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. Tenn. 1982).

Buyer of business machines was not "debtor" of seller under UCC § 9-105(1) until execution and delivery of security interest agreement where buyer received machines to test usage prior to execution and delivery of agreements, and obtaining of outside financing by buyer was condition precedent to ultimate purchase; thus, financing statements filed within ten days after execution and delivery of purchase money security interest agreements complied with ten-day requirement of UCC § 9-312(4) and were entitled to priority over prior chattel mortgage security agreement containing after-acquired equipment security clause. In *re Ultra Precision Indus., Inc.*, 503 F.2d 414 (9th Cir. Cal. 1974).

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plain-

tiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Although owner of property permitted debtor to use it as collateral for loan from secured party and valid security interest attached in favor of secured party under security agreement given by debtor, secured party failed to properly perfect its interest in that financing statement it filed did not contain any reference to owner of collateral; in view of provision of UCC § 9-105(1)(d), that term "debtor" may include both owner of collateral and obligor if context so requires, UCC § 9-402, subdivisions (1) and (3), requiring that financing statement contain "debtor's" name, must be construed as referring to both actual debtor and owner of collateral, thus requiring both names on financ-

ing statement to perfect security interest. *K.N.C. Whsle., Inc. v. AWMCO, Inc.*, 56 Cal. App. 3d 315, 99 A.L.R.3d 473 (1st Dist. 1976).

Notice requirement of UCC § 9-504(3) refers to collateral, not to obligation, and "debtor" entitled to notice by that provision is owner of collateral; thus, maker of note was not entitled to notice of sale where automobile given as security for note was owned by his cosigner. *New Haven Water Co. Emp. Credit Union v. Burroughs*, 6 Conn. Cir. Ct. 709, 313 A.2d 82 (1973).

An automobile dealer who sells a conditional sales contract to a bank and at the same time executes an agreement which provides that in the event of default he will repurchase the contract for the unpaid balance is a debtor of the bank under the terms of ¶ (d) of subd (1) of this section. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

11. —Guarantor of obligation as debtor.

In action by bank seeking recovery under note and commercial equipment security agreement against guarantors, where bank sold collateral upon default prior to giving notice to guarantors and where guaranty agreement expressly waived notice of disposition of collateral, waiver clause was of no effect in that (1) guarantor is a debtor under definition of UCC § 9-105(1)(d), and (2) under UCC § 9-501(3), code provisions covering debtor's rights regarding disposition of collateral and redemption of collateral may not be waived. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Under UCC § 9-402(1), a financing statement must include the name and address of the debtor. In this connection, however, the term "debtor" is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

A guarantor of payment of a secured party is entitled to the same notice of sale of the collateral as the debtor is entitled to (Uniform Commercial Code, § 9-504, subd [3]) since a guarantor is a "debtor" within the meaning of section 9-105 (subd [1], par [d]) of the Uniform Commercial Code which does not require the "debtor" to be the owner or have rights in the collateral. The debtor is only required to be an "obligor in any provision dealing with the obligation". It is imperative for the guarantor to receive notice of the dispositional sale in order to protect his right to reduce his potential liability at the sale. Requiring the secured party to give notice to the guarantor of the disposition of the collateral will not cause the creditor to suffer any prejudice or impose an undue burden. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Guarantor is "debtor" within meaning of UCC § 9-105(1)(d) and § 9-504(3), and thus is entitled to notice of disposition of collateral. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Guarantors of promissory note secured by collateral were "debtors" within meaning of UCC §§ 9-105(1)(d) and 9-504(3) and were entitled to reasonable notification prior to disposition of collateral by secured party; failure to provide such notice precluded entry of deficiency judgment in action by secured party against guarantors. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. App. 1975).

12. "Goods".

United States coins having a numismatic value in excess of the value expressed on their face and pledged as collateral to secure a bank loan are to be considered as "goods" within the meaning of the UCC, and not solely as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), aff'd, 387 F.2d 118 (8th Cir. Mo. 1968).

Drawings, reports, catalogues, literature, bids, proposals, and cost estimates are not "goods" as defined in ¶ (f) of subsection (1) of § 9-105, but are intangibles and not subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

"Proprietary tooling, including jigs, fixtures, patterns, core boxes, molds, etc.,"

and, catalogue item type of equipment used by the debtor in the manufacture of its products are “goods” as defined in ¶ (f) of subsection (1) of § 9-105 and subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

13. “Instrument”.

In an action by a bank against a purchaser of truck bodies to obtain monies paid by the purchaser to the Internal Revenue Service after the IRS had issued a tax levy against funds owing to the seller of truck bodies, the trial court properly granted judgment for the bank where the contract between the seller and the purchaser had been delivered, assigned and accepted by the bank to secure a loan to the seller and, thereby, gave the bank a perfected security interest in the contract, an instrument under § 75-9-105, which held priority over the tax lien of the IRS which had never been filed at the principal place of business of the taxpayer. *International Harvester Co. v. Peoples Bank & Trust Co.*, 402 So. 2d 856 (Miss. 1981).

Since non-negotiable certificate of deposit was “instrument” under UCC § 9-105(1)(g), only way security interest in certificate could be perfected was by possession under specific provisions of UCC § 9-304(1) and, thus, where secured party perfected security interest in certificate of deposit by taking possession, no subsequent claim by bank could impair that interest, and bank was not entitled to offset against certificate its claims against original owner of certificate arising out of original owner’s previous indebtedness to bank. *First Nat’l Bank v. Lone Star Life Ins. Co.*, 529 S.W.2d 67 (Tex. 1975).

14. “Security agreements.”

Agreement between debtor and supplier of gasoline dispensing equipment and fuel was true consignment agreement, rather than security agreement, since supplier retained sole control over setting retail prices, debtor received commission rather than profit, and debtor was obligated to pay for gasoline when it was sold rather than when it was delivered. *In re Sullivan*, 103 B.R. 792 (Bankr. N.D. Miss. 1989).

The test under which a document is determined to be a “security agreement,” as defined in UCC § 9-105(1)(l), is one of intent to create a security interest in the collateral. *Queen of the N., Inc. v. LeGrue*, 582 P.2d 144 (Alaska 1978).

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer’s invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband’s name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff’s security interest in automobile validly attached under UCC § 9-204(1), since husband had “right” in automobile as matter of law and could use it for collateral, even though wife was vehicle’s registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as “debtor” and did not refer to wife who actually owned automobile, (4) defendant’s security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant’s financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant’s security interest in auto-

mobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Lease of airplane for term of sixty months which provided that if lessee failed to pay rent when due, lessor could take possession of airplane, sell it at public or private sale, and retain net proceeds of sale as liquidated damages was not true lease governed by law of bailments, but was security agreement within meaning of UCC § 9-105(h), so as to cause lessor's repossession and sale of airplane to be governed by UCC Article 9. *American Lease Plans, Inc. v. Cardin*, 558 S.W.2d 325 (Mo. Ct. App. 1977).

Chattel mortgage may serve both as "security agreement" and "financing statement" under Nebraska UCC, provided it complies with requirements for said instruments, and contains necessary information, as set out in UCC. *Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co.*, 191 Neb. 74, 214 N.W.2d 18 (1974).

Instrument recited that buyer of corporate stock had given seller note for unpaid balance and that, if note remained unpaid, document constituted assignment of buyer's interest in shares of other corporate stock; held, this constituted security agreement. *Gamble v. Hinds*, 10 Cal. App. 3d 1021 (2d Dist. 1970).

15. —Financing statement as security agreement.

Nothing in either UCC § 9-105 or 9-203 requires that financing statement be separate piece of paper from security agreement, or that any particular words be used to evidence security interest, and agreement must merely provide for security interest, so that third party might know that such interest exists in particular piece of property. Thus, instrument signed by secured party and debtor was valid security agreement, and not merely

financing statement, where agreement provided for security interest by use of wording "Secured Hereby" in stamped overprint, and where document met requirements of security agreement in other respects, i.e., it described collateral and was signed by debtor. *Morey Mach. Co. v. Great W. Indus. Mach. Co.*, 507 F.2d 987 (5th Cir. Fla. 1975).

The absence of a checkmark on a financing statement to show the debtor had authorized filing without her signature did not impair the creditor's security interest, where the statement was otherwise sufficient. *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc.*, 32 A.D.2d 643 (2d Dep't 1969).

16. —With other documents.

Financing statement together with stipulation for judgment is sufficient as security agreement under UCC § 9-105(h). *Cheek v. Caine & Weiner Co.*, 335 F. Supp. 1319 (C.D. Cal. 1971).

A financing statement together with a promissory note, which note read, inter alia, "This note is secured by a certain financing statement," constituted a valid security agreement under UCC § 9-105(h), even though the financing statement filed in the office of the Secretary of State did not contain the debtor's grant of security interest. *Cheek v. Caine & Weiner Co.*, 335 F. Supp. 1319 (C.D. Cal. 1971).

Although financing statement cannot alone serve as security agreement, it can serve as such where enclosed and signed with letter sent by creditor to corporate debtor setting forth indebtedness and repayment terms, one of which was that debtor execute financing statement. In re *Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. Ga. 1972).

17. —Ineffective security agreements.

Secured party's security interest in debtor's inventory was not perfected where description in financing statement required by UCC § 9-402(1) described collateral as "all accounts and contracts owned by the debtor or arising from the sale of inventory," since secured party could perfect security interest only in types of collateral listed on financing

statement and under UCC § 9-105(1)(f), neither the term “accounts” nor the term “contracts” included inventory. *Gulf Nat’l Bank v. Franke*, 563 F.2d 766 (5th Cir. 1977).

Despite parties’ intention and attempt to create security interest in favor of seller of automobile, bill of sale, describing automobile and setting out terms of payment and insurance, and certificate of title, showing purchaser to be owner and seller to be holder of first lien, did not satisfy minimal Code requirements, since neither contained language actually conveying security interest. *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. Mo. 1973).

Where seller of cattle received notes, signed by debtor, with notations that they were secured by financing statements filed, describing collateral and signed by both debtor and secured party, secured party did not have perfected security interest in collateral described in financing statement since no security agreement was signed granting security interest in collateral. *Barth Bros. v. Billings*, 68 Wis. 2d 80, 227 N.W.2d 673 (1975).

18. —Promissory note as security agreement.

Under UCC § 9-105(1)(h), which defines security agreement as one which “creates or provides for” a security interest, promissory note which included line, “This note is secured by a Security Interest in subject personal property as per invoices,” qualified as security agreement; incorporation of invoices into promissory note by reference was sufficient description of collateral under UCC §§ 9-203(1)(b) and 9-110, when coupled with existence of financing statement containing more specific description. In re *Amex-Protein Dev. Corp.*, 504 F.2d 1056 (9th Cir. Cal. 1974).

Promissory notes, which contained no language expressly or by implication granting to seller lien or interest in automobile as security for repayment of loan, but merely contained reference to automobile by make, year and serial number, did not constitute security agreement and did not create security interest in seller; and deficiency could not be supplied by notation contained in certificate of ownership designating seller as “secured party.” First

County Nat’l Bank & Trust Co. v. Canna, 124 N.J. Super. 154, 305 A.2d 442 (App. Div. 1973).

19. “Secured party”.

Where part of collateral had been transferred to third party prior to debtor’s bankruptcy, creditor was secured only as to collateral in bankrupt’s possession; while creditor lost secured status as to transferred collateral, bankrupt’s guarantors still had obligation to pay unsecured portion of debt. *R.I.D.C. Indus. Dev. Fund v. Snyder*, 539 F.2d 487 (5th Cir. Fla. 1976), cert. denied, 429 U.S. 1095, 97 S. Ct. 1112, 51 L. Ed. 2d 542 (1977).

Since contract right is personal property which can serve as collateral under UCC § 9-105(1)(c), owner of stock in corporation formed to sell eggs, after selling such stock under contract providing that buyers would make payments therefor on instalment plan, could assign right to sale proceeds to third party as security for loan made by third party to owner, regardless of whether owner himself had security interest with buyers of such stock to enforce their payments. *Ralston Purina Co. v. Detwiler*, 173 Ind. App. 513, 364 N.E.2d 180 (1977).

Under UCC § 9-105(1)(i), a secured party under Article 9 is a “purchaser” within meaning of UCC § 1-201(33); thus, where credit corporation had prior valid security interest in automobile dealer’s inventory, where automobile wholesaler sold and delivered used cars and trucks to dealer with unencumbered certificates of title, but where dealer’s checks in payment for vehicles were dishonored, under UCC § 2-403, dealer could transfer good title to “good faith purchaser for value,” despite fact dealer tendered, for purchase of vehicles, checks which were subsequently dishonored, and, hence, credit corporations’ security interest in automobiles delivered to dealer was superior to wholesaler’s interest. *Swets Motor Sales, Inc. v. Praisner*, 236 N.W.2d 299 (Iowa 1975).

Where securities were pledged to broker who in turn pledged securities to bank for a loan, bank was a vendor of money in whose favor there existed a security interest and, therefore, was a “secured party” under the duty of exercising reasonable care for the preservation and protection of

the collateral held by it. *Grace v. Sterling, Grace & Co.*, 30 A.D.2d 61 (1st Dep't 1968).

20. Other terms.

Under UCC § 9-105(1)(f) and Official Comment 3, "inventory" is tangible collateral and "accounts" are intangible collateral. *Gulf Nat'l Bank v. Franke*, 563 F.2d 766 (5th Cir. 1977).

Where creditor of New York lessor of heavy equipment, installed in New Jersey by New Jersey lessee, perfected security interest in equipment leases by New York filing but did not perfect its interest in reversion in New Jersey where equipment was located, lessor's trustee in bankruptcy had priority with respect to equipment itself over creditor's unperfected security interest. In re *Leasing Consultants, Inc.*, 351 F. Supp. 1390 (E.D.N.Y. 1972), remanded, 486 F.2d 367 (2d Cir. N.Y. 1973).

Where the creditor is not aware that the collateral is owned by a third person, an extension made to the debtor does not release the collateral as the third person is only protected as a "surety" where his interest in the collateral is known to the creditor. *Mauch v. First Nat'l Bank*, (1967).

The Uniform Commercial Code makes an express distinction between a "secured creditor" (see UCC § 9-105(1)(m)) and a "lienholder." Under UCC § 9-301(3), a "lien creditor" is a creditor who has acquired a lien on the property involved by attachment, levy, or the like. *Kramer v. McDonald's Sys.*, 61 Ill. App. 3d 947, 378 N.E.2d 522 (1st Dist. 1978), *aff'd*, 77 Ill. 2d 323, 33 Ill. Dec. 115, 396 N.E.2d 504 (1979).

B. Decisions Under Former Statutes.

21. In general.

Section 5080-19 of the uniform trust receipts act, which defines a buyer in the ordinary course of trade as one who buys for new value, acts in good faith and who has no actual knowledge of the title held by another, does not expressly or by necessary inference, exclude a sale of a vehicle by one dealer to another. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

Under an automobile floor planning agreement, a sale by trustee of an automobile to another automobile dealer was a retail sale permitted by the floor planning arrangement. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

Where a trust agreement permitted the trustee to sell an automobile in the ordinary course of retail sale, the word retail is to be counterdistinguished from bulk sales, which, as to requirement of notice to creditors of the seller, was provided for under the bulk sales law. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

III. Under former § 75-9-106.

22. In general; "Account".

Where loan agreement defined "account" as a right to payment for goods sold or leased or for services rendered and including a right to payment which had been earned under a contract right, a financing statement which described the collateral as "accounts receivable" was sufficient to perfect a security interest in the proceeds of a government contract. In re *Varney Wood Prods., Inc.*, 458 F.2d 435 (4th Cir. Va. 1972).

23. —Other terms distinguished.

Contract rights arising out of contracts for installation of carpeting came within meaning of term "account" as defined in UCC § 9-106, in that contracts created rights for services rendered, and these contract rights came within definition of "collateral" contained in UCC § 105(c), in that they constituted accounts covered by security agreement between debtor and secured party. *Pine Bldrs., Inc. v. United States*, 413 F. Supp. 77 (E.D. Va. 1976).

Assignment of portion of expected recovery of pending lawsuit given as security for loan and accounting services was not assignment of "account" or "contract right," but was more aptly categorized as assignment of "general intangible," which would not be perfected until filing of financing statement. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

UCC § 9-106 differentiates an "account" from a "contract right" in that an

“account” is a right to payment that has been earned by performance while a “contract right” is a right to payment to be earned in the future; once the right to payment has been earned, the contract right is extinguished and an account arises; while the distinction may have little significance (1971 Editorial Board Recommendation for UCC was that term “contract right” be eliminated as unnecessary), they are distinct categories of property each of which may serve as collateral in secured transaction under UCC § 9-102(1)(a). *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

State highway department’s obligation to a partner for his share of the work done by the partnership on a completed highway construction project was not a “contract right” but was an “account.” *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963).

24. “Contract right”.

Security deposit under lease was contract right within meaning of Code rather than simple common-law pledge. *United States v. Samel Ref. Corp.*, 461 F.2d 941 (3d Cir. Pa. 1972).

Contract rights arising out of contracts for installation of carpeting came within meaning of term “account” as defined in UCC § 9-106, in that contracts created rights for services rendered, and these contract rights came within definition of “collateral” contained in UCC § 105(c), in that they constituted accounts covered by security agreement between debtor and secured party. *Pine Bldrs., Inc. v. United States*, 413 F. Supp. 77 (E.D. Va. 1976).

“Contract rights” are personal property in Texas. *Centex Constr. Co. v. Kennedy*, 332 F. Supp. 1213 (S.D. Tex. 1971).

Tenant’s right to payment of unused portion of security deposit conditioned upon subsequent performance of obligations under lease was “contract right” subject to security interest of creditor covering all contract rights of tenant. *United States v. Samel Ref. Corp.*, 313 F. Supp. 684 (E.D. Pa. 1970), *aff’d*, 461 F.2d 941 (3d Cir. Pa. 1972).

“Joint payment agreement” is security agreement which creates security interest in contract right. *Welbourne Dev. Co. v.*

Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

25. —Assignment of contract right.

Contractor’s assignment of right to payment to its surety pursuant to indemnity agreement was account or contract right within meaning of UCC § 9-106 and was, as such, security interest subject to provisions of Article 9 of UCC; however, UCC §§ 9-301 and 9-302 provide that, with respect to such security interests in accounts and contract rights, any lien creditor, including judgment lien creditor, will have priority over secured interest unless financing statement has been filed; since no such financing statement was filed by surety with respect to assignment in question, its security interest remained subordinate to tax liens of United States. *American Fid. Fire Ins. Co. v. United States*, 385 F. Supp. 1075 (N.D. Cal. 1974).

Letter from contractor to owner of building to be erected under contract notifying owner that contract rights of contractor had been assigned to bank as security for loan on which owner stated in writing that he recognized above-described contract assignment and agreed to make payment jointly to owner and bank as requested in said letter was sufficient to constitute valid assignment and bank acquired security interest in contract rights under UCC § 9-106. *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974).

Uniform Commercial Code § 9-318 and § 9-106 are apparently limited to instances of assignments of executory contracts. *Gramatan Co. v. D’Amico*, 50 Misc.2d 233 (1966).

A letter written by a subcontractor to his general contractor advising the latter of the assignment of his account for work performed to a bank, the written acceptance of the letter by the addressee, and the fact that the bank loaned money to the subcontractor taking the letter assignment as collateral, created a valid security interest which did not have to be perfected by the filing of a financing statement. *Citizens & S. Nat’l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965).

When a contractor, in applying to a surety for a performance bond, condition-

ally assigned to the surety money to become due under the contract as security against loss to the surety in the event of the contractor's default, the right thereby acquired by the surety—a right to as yet unearned payment under a contract—was a security interest which had to be perfected in the manner specified by the Code. *Hartford Accident & Indem. Co. v. State Pub. Sch. Bldg. Auth.*, 26 Pa. D. & C.2d 717 (1961).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid against a lien creditor, including a trustee in bankruptcy, from the date of the filing of the petition; hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

26. —Other terms distinguished.

Contract rights arising out of contracts for installation of carpeting came within meaning of term "account" as defined in UCC § 9-106, in that contracts created rights for services rendered, and these contract rights came within definition of "collateral" contained in UCC § 105(c), in that they constituted accounts covered by security agreement between debtor and secured party. *Pine Bldrs., Inc. v. United States*, 413 F. Supp. 77 (E.D. Va. 1976).

Assignment of portion of expected recovery of pending lawsuit given as security for loan and accounting services was not assignment of "account" or "contract right," but was more aptly categorized as assignment of "general intangible," which would not be perfected until filing of financing statement. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

Where loan agreement defined "account" as a right to payment for goods sold or leased or for services rendered and

including a right to payment which had been earned under a contract right, a financing statement which described the collateral as "accounts receivable" was sufficient to perfect a security interest in the proceeds of a government contract. In *re Varney Wood Prods., Inc.*, 458 F.2d 435 (4th Cir. Va. 1972).

UCC § 9-106 differentiates an "account" from a "contract right" in that an "account" is a right to payment that has been earned by performance while a "contract right" is a right to payment to be earned in the future; once the right to payment has been earned, the contract right is extinguished and an account arises; while the distinction may have little significance (1971 Editorial Board Recommendation for UCC was that term "contract right" be eliminated as unnecessary), they are distinct categories of property each of which may serve as collateral in secured transaction under UCC § 9-102(1)(a). *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

State highway department's obligation to a partner for his share of the work done by the partnership on a completed highway construction project was not a "contract right" but was an "account." *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963).

27. "General intangibles".

Trade secrets possess sufficient attributes of property to be subject to security interests as general intangibles. *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 75 A.L.R.4th 997, 2 U.S.P.Q.2d 1866 (Miss. 1987).

A liquor license is a "general intangible" within the meaning of UCC § 9-106 and can be the subject of a security interest. *Queen of the N., Inc. v. LeGrue*, 582 P.2d 144 (Alaska 1978).

Lien obtained through attachment execution on partnership interest, after defendant had allegedly assigned interest to his attorney as collateral for fees and costs, took priority over rights of attorney-assignee; partnership interest came within definition of "general intangible" under UCC § 9-106, security interest therein was clearly within scope of security interests governed by article 9 of code under UCC § 9-102, and, inasmuch as no

financing statement was filed under UCC § 9-302, such security interest was unperfected and plaintiff's lien, obtained through attachment execution, took priority under UCC § 9-301 over rights of defendant's attorney as holder of unperfected security interest of which plaintiff had no knowledge. *Med-Mar, Inc. v. Dilworth*, 96 Montg. County L. Rep. 91 (Pa. 1972).

Drawings, reports, catalogues, literature, bids, proposals, and cost estimates are not "goods" as defined in ¶ (f) of subsection (1) of § 9-105, but are intangibles and not subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

28. —Other terms distinguished.

Assignment of portion of expected recovery of pending lawsuit given as security for loan and accounting services was not assignment of "account" or "contract right," but was more aptly categorized as assignment of "general intangible," which would not be perfected until filing of financing statement. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

IV. Under former § 75-9-109.

29. In general.

Under UCC § 9-109(1)-(4), goods are classified as consumer goods, equipment, farm products, or inventory. These classifications, as declared by Official Comment 2, are mutually exclusive. Thus, if goods are farm products, they are neither equipment nor inventory. *First State Bank v. Producers Livestock Mktg. Ass'n Non-Stock Coop.*, 200 Neb. 12, 261 N.W.2d 854 (1978).

Classifications contained in UCC § 9-109 are intended primarily for the purpose of determining which set of filing requirements is proper. In *re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Because UCC § 9-109 bases proper place of filing on "the principal use to which the property is put", creating uncertainty, in bankruptcy situations involving the UCC, the only answer would seem to be that a creditor in doubt about the proper classification of collateral should

file in all possible counties where filing might be required. In *re McClain*, 447 F.2d 241 (10th Cir. Okla. 1971), cert. denied, 405 U.S. 918, 92 S. Ct. 943, 30 L. Ed. 2d 788 (1972).

Where both the conditional sale and the repossession of an automobile pre-date the adoption of the UCC, the New Jersey Uniform Conditional Sales Act controlled the issues between the parties. *Elizabethport Banking Co. v. Tuzeneau*, 87 N.J. Super. 17, 207 A.2d 707 (App. Div. 1965).

30. "Consumer goods".

Household goods and furnishings purchased by three Chapter 13 debtors from furniture store qualified as "consumer goods," under Mississippi law. In *re Shaw*, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

Under UCC § 9-109(1)-(4), goods are classified as consumer goods, equipment, farm products, or inventory. These classifications, as declared by Official Comment 2, are mutually exclusive. Thus, if goods are farm products, they are neither equipment nor inventory. *First State Bank v. Producers Livestock Mktg. Ass'n Non-Stock Coop.*, 200 Neb. 12, 261 N.W.2d 854 (1978).

31. —Other terms distinguished.

"Proprietary tooling, including jigs, fixtures, patterns, core boxes, molds, etc.," and, catalogue item type of equipment used by the debtor in the manufacture of its products are "goods" as defined in ¶ (f) of subsection (1) of § 9-105 and subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

A guitar and amplifier primarily used by the purchaser to perform in night clubs are "equipment" and not "consumer goods," and consequently the seller's security interest must be perfected to be enforceable against a person to whom the instruments were subsequently pawned. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

An automobile held in inventory by recognized dealer constitutes consumer goods and a buyer in the ordinary course of business purchases the automobile free of any security interest. *Murphy v.*

Plymouth Nat'l Bank, 22 Mass. App. Dec. 36 (1961).

32. —Items for personal use.

Where defendant buyer purchased airplane secured by contemporaneously executed security agreement from plaintiff's assignor with intent that it be used for personal rather than commercial purposes, and aircraft was, in fact, used solely for personal purposes for three months after purchase, airplane constituted "consumer goods" within meaning of Washington version of UCC § 9-501(1), which makes defaulting debtor not liable for any deficiency after secured party has disposed of collateral in cases involving purchase money security interests in consumer goods taken or retained by sellers of such collateral, notwithstanding defendant did make plane available for rental about nine months after executing security agreement and notwithstanding airplane was expensive hobby item. *Commercial Credit Equip. Corp. v. Carter*, 83 Wash. 2d 136, 516 P.2d 767, 77 A.L.R.3d 1218 (1973).

Since television set and tape player were consumer goods, filing was not necessary to perfect purchase money security interest of conditional seller who thus had priority over security interest of pawnbroker who subsequently took possession of goods as security for loan. *Kimbrell's Furn. Co. v. Friedman*, 261 S.C. 172, 198 S.E.2d 803 (1973).

A household laundry dryer is within the definition of "consumer goods." *United Gas Imp. Co. v. McFalls*, 18 Pa. D. & C.2d 713 (1959).

33. —Boats.

Boat purchased by debtor was "consumer goods" as matter of law under UCC § 9-109(1), so as to render proper secured party's filing of financing statement in county of debtor's residence, where evidence showed that boat was bought and used primarily for debtor's personal and family use. *McGehee v. Exchange Bank & Trust Co.*, 561 S.W.2d 926 (Tex. Civ. App. 1978), *ref. n.r.e.* (May 10, 1978).

That a boat was consumer goods may be inferred from the uncontradicted testimony of the purchasers as to their occu-

pation. *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960).

34. —Motor vehicles.

A mobile home is a motor vehicle within the meaning of UCC § 9-302 which requires that a financing statement be filed to perfect a security interest therein. *Recchio v. Manufacturers & Traders Trust Co.*, 35 A.D.2d 769 (4th Dep't 1970).

35. —Motor vehicles; personal use.

Consumer goods, which under the instant section are those "used or bought for use primarily for personal, family or household purposes" were assumed to include a two-door Pontiac automobile. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

An automobile purchased for personal, family, or household purposes is classified as consumer goods. *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

An automobile which conditional buyer purchased to use in going to and from his place of employment falls within the category of "consumer goods." *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

36. —Motor vehicles; dealer use.

Automobiles delivered by an automobile manufacturer to its authorized dealer, with a reservation of title until actual payment therefor, were not "consumer goods" which would relieve the manufacturer, as the holder of a security interest, from the requirement of perfecting its security interest in order to take priority over a lien creditor. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

37. —Miscellaneous items.

Sandblasting hoods and respirators used by employees in course of their employment are not consumer goods within meaning of UCC § 9-109(1) and UCC § 2-103(3). *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd sub nom. Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), *aff'd*, 560 F.2d 1022 (5th Cir. Ala. 1977).

Plaintiff employee's cause of action for injuries, based on breach of implied war-

warranties of merchantability and fitness for particular purpose of crane purchased by plaintiff's employer, against manufacturer of crane was barred under UCC § 2-725(1) and (2) where (1) action was commenced more than four years after delivery of crane to employer, (2) "future-performance-of-goods" exception to normal accrual-of-cause-of-action rule contained in UCC § 2-725(2) did not apply to case, since Uniform Commercial Code did not intend that "implied" warranty could be "explicitly" extended to future performance, but contemplated that such exception should apply only to "express" warranties, and (3) "consumer-goods" exception to normal-accrual-of-cause-of-action rule in UCC § 2-725(2) also did not apply to case, since crane that injured plaintiff was "equipment" and not "consumer goods" under UCC § 2-103(3) and § 9-109(1) and (2). *Wright v. Cutler-Hammer, Inc.*, 358 So. 2d 444 (Ala. 1978).

A cash register does not come within the definition of consumer goods. *In re Tops Cleaners, Inc.*, 20 Pa. D. & C.2d 264 (1960).

38. "Equipment".

"Equipment" is defined in the negative in UCC § 9-109(2); that is, collateral or goods become "equipment" when they do not fall into any of the other categories listed in UCC § 9-109. *Grimes v. Massey Ferguson, Inc.*, 355 So. 2d 338 (Ala. 1978).

39. —Construction equipment.

Plaintiff employee's cause of action for injuries, based on breach of implied warranties of merchantability and fitness for particular purpose of crane purchased by plaintiff's employer, against manufacturer of crane was barred under UCC § 2-725(1) and (2) where (1) action was commenced more than four years after delivery of crane to employer, "future-performance-of-goods" exception to normal accrual-of-cause-of-action rule contained in UCC § 2-725(2) did not apply to case, since Uniform Commercial Code did not intend that "implied" warranty could be "explicitly" extended to future performance, but contemplated that such exception should apply only to "express" warranties, and (3) "consumer-goods" exception to normal-accrual-of-cause-of-

action rule in UCC § 2-725(2) also did not apply to case, since crane that injured plaintiff was "equipment" and not "consumer goods" under UCC § 2-103(3) and § 9-109(1) and (2). *Wright v. Cutler-Hammer, Inc.*, 358 So. 2d 444 (Ala. 1978).

Where creditor of New York lessor of heavy equipment, installed in New Jersey by New Jersey lessee, perfected security interest in equipment leases by New York filing but did not perfect its interest in reversion in New Jersey where equipment was located, lessor's trustee in bankruptcy had priority with respect to equipment itself over creditor's unperfected security interest. *In re Leasing Consultants, Inc.*, 351 F. Supp. 1390 (E.D.N.Y. 1972), remanded, 486 F.2d 367 (2d Cir. N.Y. 1973).

A bank which had filed its financing statement with the New Jersey Secretary of State had perfected its security interest in five items of self-propelled earth moving equipment although it had not filed a financing statement with the Director of Division of Motor Vehicles, an act required by state statute as a condition precedent to the perfection of a security interest in "motor vehicles" (a term defined in the statute to include self-propelled earth moving equipment), the court holding that despite the statutory definition, the term "motor vehicle" was not intended to embrace machinery which normally operates at construction sites even though literally it perhaps can be used to transport persons on a highway. *In re Ferro Contracting Co.*, 380 F.2d 116 (3d Cir. N.J. 1967), cert. denied, 389 U.S. 974, 88 S. Ct. 475, 19 L. Ed. 2d 466 (1967).

40. —Other terms distinguished.

Guitar and amplifier primarily used to perform in night clubs were "equipment" within Code § 9-109(2), and not within Code § 9-302(1)(d) consumer goods exception to Code filing requirements. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

By excluding "farm products" from the classifications of "equipment" and "inventory," and by expressly providing that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the

draftsmen of the Code apparently intended to freeze the agricultural mortgagee into the special status he had achieved under pre-code case law. *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

"Proprietary tooling, including jigs, fixtures, patterns, core boxes, molds, etc.," and, catalogue item type of equipment used by the debtor in the manufacture of its products are "goods" as defined in ¶ (f) of subsection (1) of § 9-105 and subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

41. —Farm machinery.

Where debtor was engaged in business of buying cattle, feeding and fattening them, and selling them for slaughter, debtor was engaged in "farming operations" and cattle were "farm products," so that sale to buyer in ordinary course of business would not cut off secured party's security interest in debtor's livestock. *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

One can be a farmer of trees if they are grown from seed and cared for in a nursery setting, but the commercial logging of trees is not farming but an industrial operation, so that filing of financing statement covering logging equipment cannot be effectively filed with county clerk and recorder. *Mountain Credit v. Michiana Lumber & Supply, Inc.*, 31 Colo. App. 112, 498 P.2d 967 (1972).

Filing at debtor's chief place of business was required to perfect security interest in equipment, and where conditional sale contract covering farm tractors was never filed anywhere, judgment creditor who executed and levied against tractors had claim superior to that of assignee of conditional sale contract. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Tractors come within UCC § 9-109(2) definition of "equipment", the mobile nature of which requires that perfection of security interest at one location will protect the secured party, regardless of the debtor's future actions. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

42. —Miscellaneous items.

Description of collateral contained in security agreement must be reasonably specific; and term "equipment" in omnibus clause of security agreement did not include two automobiles owned by debtor corporation. *In re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Furniture, furnishings and carpeting sold to a Golden Age Home, a nonprofit corporation, constituted equipment. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

43. "Farm products".

Ginned cotton is a "farm product" under UCC § 9-109(3). *Oxford Prod. Credit Ass'n v. Dye*, 368 So. 2d 241 (Miss. 1979).

Where bank's security agreement was clearly intended to create security interest in all of debtor's livestock that was used or bought primarily for farming operations, as distinguished from business operations, bank's security interest did not apply to cattle that debtor bought for immediate resale and sold, shortly after their purchase, at public auction conducted by defendant auctioneer, since under UCC § 9-109(4), such cattle were inventory as matter of law because they were used only in connection with debtor's activities as cattle trader or speculator. *First State Bank v. Producers Livestock Mktg. Ass'n Non-Stock Coop.*, 200 Neb. 12, 261 N.W.2d 854 (1978).

Where debtor was engaged in business of buying cattle, feeding and fattening them, and selling them for slaughter, debtor was engaged in "farming operations" and cattle were "farm products," so that sale to buyer in ordinary course of business would not cut off secured party's security interest in debtor's livestock. *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

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Tractors come within UCC § 9-109(2) definition of "equipment", the mobile nature of which requires that perfection of security interest at one location will protect the secured party, regardless of the debtor's future actions. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Filing at debtor's chief place of business was required to perfect security interest in equipment, and where conditional sale contract covering farm tractors was never filed anywhere, judgment creditor who executed and levied against tractors had claim superior to that of assignee of conditional sale contract. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Cattle purchased as part of dairy herd are not "inventory" as defined in UCC § 9-109. *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

44. "Inventory".

The Civil Court of the City of New York, which has no general equity jurisdiction (CCA, § 202), lacks subject matter jurisdiction over a creditor's action to hold defendant, as transferee, liable for the debt of a third party because of defendant's failure to comply with the Bulk Sales Act, which act is designed to prevent commercial fraud by declaring "ineffective" the sale or transfer of a debtor's bulk inventory if there is a failure to notify the creditors of such sale or transfer (Uniform Commercial Code, § 6-105), since, in order to obtain relief under the act, defrauded or unnotified general creditors must sue in equity to set aside the transfer or seek such other equitable remedies as the circumstances indicate and an action at law for a money judgment against the transferee for violations of the act cannot be maintained except in the exceptional case where the facts indicate tortious conduct or breach of contract; even if there were jurisdiction, the action would still be dismissed since the debtor was in the business of selling jewelry and diamonds and the sale to defendant of its office furniture and equipment, customers' lists, jewelry catalogues and a telephone listing was, therefore, not a bulk transfer of its inventory (Uniform Com-

mercial Code, § 6-102), inventory being defined as goods held for sale. *H.L.C. Imports Corp. v. M & L Siegel, Inc.*, 98 Misc. 2d 179 (1979), but see, *Talbot Typographics, Inc. v. Tenba, Inc.* 147 Misc. 2d 922, 560 N.Y.S.2d 82 (Civ. Ct. 1990).

Goods which are held for sale or lease are classified as inventory by UCC § 9-109(4). The principal test to determine if goods are inventory is whether they are held for immediate or ultimate sale. In borderline cases, the principal use to which the property is put is determinative. *First State Bank v. Producers Livestock Mktg. Ass'n Non-Stock Coop.*, 200 Neb. 12, 261 N.W.2d 854 (1978).

By excluding "farm products" from the classifications of "equipment" and "inventory," and by expressly providing that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the draftsmen of the Code apparently intended to freeze the agricultural mortgagee into the special status he had achieved under pre-code case law. *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

An automobile held in inventory by recognized dealer constitutes consumer goods and a buyer in the ordinary course of business purchases the automobile free of any security interest. *Murphy v. Plymouth Nat'l Bank*, 22 Mass. App. Dec. 36 (1961).

45. —Other terms distinguished.

Under Code, classification of goods is mutually exclusive, so that, as between same parties and at same point in time, product cannot be classified as both "inventory" and "consumer goods"; manner in which product is classified as determined at time of agreement between parties giving rise to security interest and, as to them, categorization remains unaffected by later transfer of product in question; held, where auto was held for purpose of resale at time of creation of security interest therein, car was "inventory" as between parties to security agreement, regardless of subsequent disposition of auto. *Franklin Inv. Co. v. Homburg*, 252 A.2d 95 (D.C. 1969).

46. —Motor vehicles.

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

The perfected security interest of a retail finance corporation who purchased a credit agreement signed by a "buyer in the ordinary course of business" from an automobile dealer had priority over the perfected interests of a bank which furnished floor plan financing to finance the dealer's acquisition and holding of motor vehicles for use and resale in the course of the dealer's business. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

Automobiles financed under a floor plan arrangement and held by an automobile dealer are inventory held for sale to the public. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

47. —Farm inventory.

Cattle purchased as part of dairy herd are not "inventory" as defined in UCC § 9-109. *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

Where bank's security agreement was clearly intended to create security interest in all of debtor's livestock that was used or bought primarily for farming operations, as distinguished from business operations, bank's security interest did not apply to cattle that debtor bought for immediate resale and sold, shortly after their purchase, at public auction conducted by defendant auctioneer, since under UCC § 9-109(4), such cattle were inventory as matter of law because they were used only in connection with debtor's activities as cattle trader or speculator. *First State Bank v. Producers Livestock Mktg. Ass'n Non-Stock Coop.*, 200 Neb. 12, 261 N.W.2d 854 (1978).

48. —Miscellaneous.

Glass, plywood, locks, hinges, pulls, felt, and other materials supplied by one company to another company to be manufactured into finished gun cabinets, which were then to be sold at reduced price to company furnishing materials, were "inventory" of manufacturer under UCC § 9-109(4) and thus subject to attachment, under UCC § 9-204(1), of perfected security interests of two banks in manufacturer's present and after-acquired inventory under security agreement executed by manufacturer in favor of banks to secure loans made by banks. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

In junior mortgagee's action for damages for defendant's alleged impairment of plaintiff's security, where defendant under security agreement with dealer in modular homes had security interest in all of dealer's present or future inventory and also first mortgage on 2.39 acres of land acquired by dealer for use as sales lot, on which dealer installed two modular homes; where plaintiff held second mortgage on dealer's 2.39 acres as security for loan on which dealer defaulted; and where defendant after dealer's default quickly removed modular homes from dealer's lot pursuant to written authorization from officer of dealer's company, (1) homes placed by dealer on sales lot, although installed on concrete foundations and connected to utilities, were inventory and not real property or fixtures under UCC § 9-109(4), since they were goods intended for

immediate or ultimate sale; (2) defendant held perfected purchase-money security interest in dealer's inventory under UCC § 9-401(1)(c) and UCC § 9-402(1), which under UCC § 9-312(3) took priority over plaintiff's junior-mortgage interest; and (3) defendant on dealer's default had right to take possession of homes on dealer's lot, since they were inventory collateral. *Rakosi v. GECC*, 59 A.D.2d 553 (2d Dep't 1977).

Where security agreement executed by building contractor granted security inter-

est to bank in all uninstalled materials on construction site and also all stoves, refrigerators, dishwashers, water heaters, heating and air-conditioning units, incinerators, carpeting, and drapes then or thereafter owned or held by contractor, or then or thereafter located on or used in connection with contractor's operation of the premises, goods secured were "inventory" within meaning of UCC § 9-109(4). *Sears, Roebuck & Co. v. Detroit Fed. Sav. & Loan Ass'n*, 79 Mich. App. 378, 262 N.W.2d 831 (1977).

RESEARCH REFERENCES

ALR. What constitutes "Accounts receivable" under contract selling, assigning, pledging, or reserving such items. 41 A.L.R.2d 1395.

Sufficiency of description in chattel mortgage as covering all property of a particular kind. 2 A.L.R.3d 839.

Secured transactions: what constitutes "consumer goods" under UCC § 9-109(1). 77 A.L.R.3d 1225.

Secured transactions: what constitutes "inventory" under UCC § 9-109(4). 77 A.L.R.3d 1266.

Security interests in liquor licenses. 56 A.L.R.4th 1131.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 9 et seq., 22.

37 Am. Jur. 2d, Fraudulent Conveyances § 253.

68 Am. Jur. 2d, Secured Transactions §§ 35, 141, 172 et seq.

73 Am. Jur. 2d, Statutes §§ 223 et seq.

2 Am. Jur. Legal Forms 2d, Animals § 20:42 (security interest in animals under terms of Uniform Commercial Code).

9 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:2981 et seq (classification of goods).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:2961, 253:2962

(definitions: "account"; ["contract right"]; "general intangibles").

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:123, 9:125 (definitions, types of collateral).

6 Am. Jur. Pl & Pr Forms (Rev ed), Secured Transactions, Forms 9:141-9:144 (definitions; classification of goods).

Instructions to jury; growing crops and timber to be cut included in "goods," 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:4, 2:5.

Definitions, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:91-9:144.

2 Am. Jur. Legal Forms 2d, Animals § 20:42 (security interest in animals under terms of Uniform Commercial Code).

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Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-9-103. Purchase-money security interest; application of payments; burden of establishing.

(a) In this section:

(1) "Purchase-money collateral" means goods or software that secures a

purchase-money obligation incurred with respect to that collateral; and

(2) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) To obligations that are not secured; and

(B) If more than one (1) obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) The limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

SOURCES: Former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56] is now found in comparable provisions enacted at §§ 75-9-301, 75-9-303, 75-9-304, 75-9-305, 75-9-306, 75-9-307, 75-9-316, and 75-9-337 by Laws, 2001, ch. 495, § 1. Present § 75-9-103 was derived from former 1972 Code § 75-9-107 [Codes, 1942, § 41A:9-107; Laws, 1966, ch. 316, § 9-107] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of purchase, money security interests, see § 75-9-324. Protection of buyer of goods from security interest created by seller, see § 75-9-320.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-107.

A. Decision Under Uniform Commercial Code.

6. In general.
7. After-acquired property.
8. Lease.
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14. Enforcement of lien.
15. Waiver of lien.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-107.

A. Decision Under Uniform Commercial Code.

6. In general.

Under Mississippi law, successive installment contracts between three Chapter 13 debtors and furniture company, which incorporated not only purchase price of new merchandise, but also balance remaining on previous contracts, provided furniture company with purchase money security interest only in property being purchased pursuant to most recent contract with each debtor, as they contained no express language allocating payments to individual items of collateral acquired through prior con-

tracts. In re Shaw, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

A purchase money chattel mortgage is a "purchase money security interest". Lonoke Prod. Credit Ass'n v. Bohannon, 238 Ark. 206, 379 S.W.2d 17 (1964).

7. After-acquired property.

Where manufacturing company, which had been making gun cabinets for another company under contract providing that such other company would furnish basic materials for cabinets, that it reserved title to such materials, and that it would buy assembled cabinets from manufacturer at reduced price, became insolvent and ceased operations after obtaining Small Business Administration loan from two banks that required manufacturer to execute security agreement in their favor in manufacturer's present and after-acquired inventory, and where such banks, after perfecting their security interests in such inventory by filing financial statements that were proper in form, content, and place of filing, attempted to enforce such security interests by taking possession of manufacturer's inventory, as against asserted interest therein of company supplying materials to manufacturer, (1) interest of supplier of materials was purchase-money security interest under UCC § 9-107(b); (2) such interest was not perfected under UCC § 9-304 by filing of financing statement concerning such materials and giving notice of claim thereto; and (3) under UCC § 9-312(3), such unperfected interest had no priority over perfected security interests of banks in such materials (which were part of manufacturer's inventory), where security interests of banks had properly attached under UCC § 9-204(1). Morton Booth Co. v. Tiara Furn., Inc., 564 P.2d 210 (Okla. 1977).

Lien on retail inventory items subsequently acquired as replacement for original items subject to lien is "purchase money security interest" within meaning of California Commercial Code provision providing that with certain exceptions no nonpossessory security interest, other than purchase money security interest, may be given or taken in or to inventory of retail merchant. Holzman v. L.H.J. Enters., Inc., 476 F.2d 949 (9th Cir. Cal.

1973), cert. denied, 414 U.S. 1135, 94 S. Ct. 878, 38 L. Ed. 2d 760 (1974).

Where debtor was corporation that operated retail clothing store, where secured party acquired perfected purchase money security interest in debtor's inventory including its proceeds and after-acquired property, where debtor corporation merged with other corporations, each operating retail clothing outlets, and, finally, where surviving corporation entered into assignment for benefit of creditors: (1) secured party had valid security interest in after-acquired inventory of debtor, notwithstanding that at time of assignment for benefit of creditors surviving corporation did not have in its possession any inventory purchased from secured party by surviving corporation for any of its constituent corporations; (2) after-acquired property clause extended to property acquired by surviving corporation after merger; and (3) financing statement on file at time of assignment for benefit of creditors was not deficient though it did not contain name of debtor-assignor. However, secured party did not have security interest in the proceeds of inventory from other stores not covered by security agreement. Inter Mt. Ass'n of Credit Men v. Villager, Inc., 527 P.2d 664 (Utah 1974).

The holder of a security interest in an automobile which qualified as "consumer goods" who releases that interest in exchange for a similar interest in another automobile which also qualified as "consumer goods" furnished new value for the later security interest. Rockland Credit Union, Inc. v. Gauthier Motors, Inc., 39 Mass. App. Dec. 180 (1967).

8. Lease.

Where lessor leased breeder stock to bankrupt with all progeny to be property of bankrupt and with first lien on progeny being granted under lease to lessor, this lien could not be equated with purchase money security interest, since element of acquiring rights in or use of collateral within meaning of UCC was missing; and lessor acquired nothing more than security interest under lease and was in same position as other suppliers to bankrupt who made swine production operation possible. Ingram v. Ozark Prod. Credit Ass'n, 468 F.2d 564 (5th Cir. Ala. 1972).

A bailment-lessor of trucks is the holder of a purchase money security interest in the trucks under this section. *Commonwealth v. Two Ford Trucks*, 185 Pa. Super. 292, 137 A.2d 847 (1958).

9. Lender.

Creditor who loaned money to debtor to enable debtor to perform contract did not establish existence of purchase-money security interest within meaning of UCC § 9-107(b), since such section contemplates that loaned funds be intended and actually used to purchase identifiable asset which will stand as secured party's collateral. *Northwestern Nat'l Bank S.W. v. Lectro Sys.*, 262 N.W.2d 678 (Minn. 1977).

Where purchaser of cows already had all possible rights in cows with both possession and title, money advanced by bank enabled purchaser to pay seller for cows but did not enable purchaser to acquire any rights in cows, so that security interest of bank was not purchase money security interest. *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972).

One who is not a seller but a lender may acquire a purchase money security interest in collateral to be purchased with proceeds of loan provided proceeds are in fact so used. *Continental Oil Co. Agrico Chem. Co. Div. v. Sutton*, 126 Ga. App. 78, 189 S.E.2d 925 (1972).

10. Particular applications.

Furniture dealer with security interest in household furniture and TV set purchased by bankrupt debtor could not claim perfected security interest in such goods under exception from filing requirements for consumer goods contained in UCC § 9-302(1)(d) where security agreement covered items purchased at different times with no information as to which items were paid for and which were not; furniture dealer's interest was not "purchase money security interest" since it was not taken or retained by dealer solely to secure all or part of collateral's price. *In re Manuel*, 507 F.2d 990 (5th Cir. Ga. 1975).

Where neither party has perfected his security interest, UCC § 9-312(5) determines priority between conflicting inter-

ests in same collateral; thus, where plaintiff-landlord had lien on tenant's property under terms of recorded lease which was valid under UCC § 9-204(3), but which was not perfected due to plaintiff's failure to file financing statement with secretary of state as required by UCC § 9-401(1)(c), and where defendant sold bar equipment to plaintiff's tenants under conditional sales contract and acquired purchase money security interest under UCC § 9-107(a), which was not perfected under UCC § 9-302(1) since defendant failed to obtain signatures of parties as required by UCC § 9-402(1), and where defendant subsequently repossessed and sold property in question, defendant's security interest took priority over plaintiff's either under theory that defendant perfected its security interest by repossessing and selling property or under theory that defendant's security interest attached prior to plaintiff's. *Engelsma v. Superior Prods. Mfg. Co.*, 298 Minn. 77, 212 N.W.2d 884 (1973).

Record disclosed that new money was provided, as distinguished from payment of pre-existing claim or antecedent debt not yet due, so that there was an advance within UCC § 9-107(2); trust receipt from air conditioning distributor to debtor which was addressed to purchase money security holder proved that advance was "in fact so used" to enable debtor to acquire rights in collateral. *Fedders Fin. Corp. v. Chiarelli Bros.*, 221 Pa. Super. 224, 289 A.2d 169 (1972).

Owner's mobile homes were placed on debtor's sales lot for purpose of display and retail sale to public; debtor possessed no indicia of ownership; held, owner had no purchase money security interest in mobile homes within UCC § 9-107 and was therefore under no obligation to notify creditor of ownership so as to preserve security interest therein. *Taylor Mobile Homes v. Founders Inv. Corp.*, 238 So. 2d 116 (Fla. App. 1970), cert. denied, 248 So. 2d 167 (Fla. 1971).

B. Decisions Under Former Statutes.

11. In general.

Statute creates purchase-money lien on personal property from time of sale while

it remains in buyer's hands or of one deriving title or possession through him with notice. *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co.*, 166 Miss. 253, 140 So. 736 (1932); *Paper Prods. Co. v. Mississippi State Tax Comm'n*, 206 So. 2d 635 (Miss. 1968).

Since a purchaser by moving an airplane into Mississippi from Louisiana, where the sale was consummated, deprived the seller of his right to seize it in Louisiana, which had a purchase money lien statute, the purchaser could not complain of the seller's attachment of the airplane in Mississippi. *Blount v. Hair*, 228 Miss. 898, 90 So. 2d 5 (1956).

Where in a suit to establish a mechanic's lien against an automobile, defendant executed a bond and retained possession of the automobile, the automobile was not in custodia legis and the plaintiff could proceed in the replevin action without intervening in the mechanic's lien proceeding. *Murdock Acceptance Corp. v. Smith*, 222 Miss. 594, 76 So. 2d 688 (1955), corrected, 222 Miss. 608, 77 So. 2d 727 (1955).

The right of a plaintiff to obtain a personal judgment where he asserts a mechanic's lien against a truck, is one which the plaintiff can exercise in his own discretion. *Hannan Motor Co. v. Darr*, 212 Miss. 870, 56 So. 2d 64 (1952).

Section 337, Code of 1942, providing for purchase money lien on personalty is in derogation of common law and must be strictly construed. *In re Monticello Veneer Co.*, 2 F. Supp. 27 (S.D. Miss. 1933).

In statute respecting purchase-money lien, words, "in hands of," means in possession of. *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co.*, 166 Miss. 253, 140 So. 736 (1932).

Lien for purchase-money for personal property is not confined to exempt property. *Frank v. Robinson*, 65 Miss. 162, 3 So. 253 (1887).

12. Attachment of lien.

This section creates a lien on property in favor of the vendor for the unpaid purchase money from the time of its sale to continue as long as it remains in the hands of the first purchaser, or one deriv-

ing title or possession through him with notice that the purchase money was unpaid. *Paper Prods. Co. v. Mississippi State Tax Comm'n*, 206 So. 2d 635 (Miss. 1968).

This section does not confer on the vendor a mere right to acquire a lien on the property by seizing it under judicial process while in the hands of the first purchaser, but rather creates a lien on the property in favor of the vendor for the unpaid purchase money from the time of its sale to continue as long as it remains in the hands of the first purchaser, or one deriving title or possession through him, with notice that the purchase money was unpaid. *Trenton Lumber Co. v. Boling*, 230 Miss. 233, 92 So. 2d 440 (1957).

Where machinery and equipment have been in the possession or under the control of one claiming a mechanic's lien while being repaired, and he surrendered possession thereof to the owner, the lien was retained to the extent that is allowed in cases of liens for purchase money of goods, and was enforceable while the property remained in the hands of the owner, or in the hands of one deriving title or possession through the owner, with notice that the indebtedness represented by the mechanic's lien was unpaid. *Billups v. Becker's Welding & Mach. Co.*, 186 Miss. 41, 189 So. 526 (1939).

Statutory purchase-money lien attached to laundry machinery delivered to local buyer pursuant to executory conditional sales contracts made in another state, but to be performed locally. *Superior Laundry & Cleaners v. American Laundry Mach. Co.*, 170 Miss. 450, 155 So. 186 (1934).

The statute cannot have effect, after delivery to the buyer, to impress a lien for purchase money on property purchased beyond the territorial limits of the state. *In re Tucker*, 1 F. Supp. 18 (S.D. Miss. 1932).

Where personal property is bought under a promise by the purchaser to secure the price with a mortgage and after getting possession he refuses to execute the mortgage the seller has a statutory lien for the price. *Kingsland & Douglas Mfg. Co. v. Massey*, 69 Miss. 296, 13 So. 269 (1891).

13. —Property purchased for resale.

Seller of automobile trailers to an equipment company on credit had a lien thereon for the purchase money while it remained in the hands of the purchaser or one deriving title or possession through it with notice that the purchase money was unpaid, although the trailers were sold and delivered for the purpose of resale. *Dorsey v. Latham*, 194 Miss. 253, 11 So. 2d 897 (1943).

Vendor has lien on goods sold merchant for resale for unpaid purchase-money while in hands of first purchaser or one deriving title thereto with notice. *Campbell Paint & Varnish Co. v. Hall*, 131 Miss. 671, 95 So. 641 (1923).

14. Enforcement of lien.

Action of replevin does not lie when plaintiff's only claim to property is purchase money lien given plaintiff vendor by this section. *Runnels v. Fairchild*, 204 Miss. 287, 37 So. 2d 312 (1948).

One who makes oral sale and delivery of motor on credit, without retaining title to, or lien upon, motor to secure purchase price, has statutory lien under this section upon motor, which vests in him right to have motor seized by officer and to have a personal judgment for his demand and sale of motor through processes of court to satisfy his demand. *Runnels v. Fairchild*, 204 Miss. 287, 37 So. 2d 312 (1948).

Personal property lien suit may be filed at any time short of the general statute of limitations so long as during that time the property remains in the hands of the original lienor, or of one deriving title or possession through him, with notice that the lien money was unpaid. *Hamilton Bros. Co. v. Baxter*, 188 Miss. 610, 195 So. 335 (1940).

Alternative prayers in a bill of complaint to recover the value of certain building blocks sold under a written contract, or, if it was found that title thereto had passed to the purchaser, to enforce a purchase money lien against such building blocks, were not inconsistent, and where it was determined that title had passed to the purchaser, the seller was

entitled to a trial of the issue whether the purchase money lien could be enforced against a subsequent purchaser. *Morris v. Smith*, 184 Miss. 618, 185 So. 548 (1939).

Unpaid conditional seller may elect between replevin and action to enforce statutory purchase-money lien. *Superior Laundry & Cleaners v. American Laundry Mach. Co.*, 170 Miss. 450, 155 So. 186 (1934).

In action by unpaid conditional seller to enforce statutory purchase-money lien, introduction in evidence of notes without proof that they were unpaid was sufficient proof of indebtedness where buyer did not plead payment specially or by giving notice thereof under general issue. *Superior Laundry & Cleaners v. American Laundry Mach. Co.*, 170 Miss. 450, 155 So. 186 (1934).

Resident of Mississippi, buying fishing equipment and leasing same of Louisiana fishermen, could not enjoin seller from prosecuting attachment suit in Louisiana. *E.J. Platte Fisheries v. Wadford*, 170 Miss. 617, 155 So. 161 (1934).

In suit to enforce purchase-money lien on automobiles, value of car is immaterial as between parties; in suit to enforce purchase-money lien on automobile in buyer's possession, writ of seizure and sheriff's return need not be introduced in evidence. *Union Motor Car Co. v. Farmer*, 151 Miss. 734, 118 So. 425 (1928).

Where plaintiff, suing in a justice court for materials furnished, made the affidavit required by the act 1884 (laws, p. 84), and had a writ of seizure and summons issued, it is error for the circuit court, on appeal, to dismiss the suit because the evidence of debt was not filed with the justice until two days after the issuance of the writ. *Bryant v. Harris Lumber Co.*, 70 Miss. 683, 12 So. 585 (1893).

15. Waiver of lien.

Purchase-money lien not waived because of seller's knowledge that goods intended for resale in regular course of business. *Campbell Paint & Varnish Co. v. Hall*, 131 Miss. 671, 95 So. 641 (1923).

RESEARCH REFERENCES

ALR. Priority as between seller or conditional seller of personalty and claimant under after-acquired property clause of mortgage or other instrument. 86 A.L.R.2d 1152.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 31-110.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:113 (“purchase money security interest” defined).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:396 (answer; defense; purchase money security interest not created).

§ 75-9-103A. “Production-money crops”; “production-money obligation”; production-money security interest; burden of establishing.

(a) A security interest in crops is a production-money security interest to the extent that the crops are production-money crops.

(b) If the extent to which a security interest is a production-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties’ agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor’s intention, in the following order:

(A) To obligations that are not secured; and

(B) If more than one (1) obligation is secured, to obligations secured by production-money security interests in the order in which those obligations were incurred.

(c) A production-money security interest does not lose its status as such, even if:

(1) The production-money crops also secure an obligation that is not a production-money obligation;

(2) Collateral that is not production-money crops also secures the production-money obligation; or

(3) The production-money obligation has been renewed, refinanced, or restructured.

(d) A secured party claiming a production-money security interest has the burden of establishing the extent to which the security interest is a production-money security interest.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Priority of production-money security interests and agricultural liens, see § 75-9-324A.

§ 75-9-104. Control of deposit account.

(a) A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) The secured party becomes the bank's customer with respect to the deposit account.

(b) A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

SOURCES: Former 1972 Code § 75-9-104 [Codes, 1942, § 41A:9-104; Laws, 1966, ch. 316, § 9-104; Laws, 1977, ch. 452, § 7; Laws, 1996, ch. 460, § 22] is now found in comparable provisions enacted at § 75-9-109 by Laws, 2001, ch. 495, § 1. Present § 75-9-104 derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Bank's rights and duties with respect to deposit accounts, see § 75-9-341.

Alienability of debtor's rights, see § 75-9-401.

Priority of security interests in deposit account, see § 75-9-327.

§ 75-9-105. Control of electronic chattel paper.

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) The authoritative copy identifies the secured party as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

SOURCES: Former 1972 Code § 75-9-105 [Codes, 1942, § 41A:9-105; Laws, 1966, ch. 316, § 9-105; Laws, 1977, ch. 452, § 8; Laws, 1978, ch. 356, § 1; Laws, 1990, ch. 384, § 48; Laws, 1996, ch. 460, § 23; Laws, 1996, ch. 468, § 57] is now

found in comparable provisions enacted at § 75-9-102 by Laws, 2001, ch. 495, § 1. Present § 75-9-105 derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Perfection of security interests in chattel paper, see § 75-9-312.

Perfection by control, see § 75-9-314.

Discharge of account debtor, see § 75-9-406.

§ 75-9-106. Control of investment property.

(a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in Section 75-8-106.

(b) A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

SOURCES: Former 1972 Code § 75-9-106 [Codes, 1942, § 41A:9-106; Laws, 1966, ch. 316, § 9-106; Laws, 1977, ch. 452, § 9; Laws, 1996, ch. 460, § 24; Laws, 1996, ch. 468, § 58] is now found in comparable provisions enacted at § 75-9-102 by Laws, 2001, ch. 495, § 1. Present § 75-9-106 derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and former 1972 Code § 75-9-115 [Laws, 1996, ch. 468, § 59] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Perfection of security interests in investment property, see § 75-9-312.

Perfection by control, see § 75-9-314.

§ 75-9-107. Control of letter-of-credit right.

A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under Section 75-5-114(c) or otherwise applicable law or practice.

SOURCES: Former 1972 Code § 75-9-107 [Codes, 1942, § 41A:9-107; Laws, 1966, ch. 316, § 9-107] is now found in comparable provisions enacted at § 75-9-102 by Laws, 2001, ch. 495, § 1. Present § 75-9-107 derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Restriction on assignment of letter-of-credit rights ineffective, see § 75-9-409.

§ 75-9-108. Sufficiency of description.

(a) Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

- (1) Specific listing;
- (2) Category;
- (3) Except as otherwise provided in subsection (e), a type of collateral defined in the Uniform Commercial Code;
- (4) Quantity;
- (5) Computational or allocational formula or procedure; or
- (6) Except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) A description of collateral as “all the debtor’s assets” or “all the debtor’s personal property” or using words of similar import does not reasonably identify the collateral.

(d) Except as otherwise provided in subsection (e), a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

- (1) The collateral by those terms or as investment property; or
- (2) The underlying financial asset or commodity contract.

(e) A description only by type of collateral defined in the Uniform Commercial Code is an insufficient description of:

- (1) A commercial tort claim; or
- (2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

SOURCES: Former 1972 Code § 75-9-108 [Codes, 1942, § 41A:9-108; Laws, 1966, ch. 316, § 9-108] was deleted by Laws, 2001, ch. 495, § 2. Present § 75-9-108 derived from former 1972 Code §§ 75-9-110 [Codes, 1942, § 41A:9-110; Laws, 1966, ch. 316, § 9-110] and 75-9-115 [Laws, 1996, ch. 468, § 59] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Indication of collateral in financing statement, see § 75-9-504. Claims concerning inaccurate or wrongfully filed record, see § 75-9-518.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-110.

A. Generally.

6. In general.
7. Description by reference.
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9. —Objective standard.

B. Particular Descriptions.

10. Accounts.
11. After-acquired property.
12. Construction equipment.
13. Crops.
14. Farm implements.
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18. Motor vehicles and boats.
19. Serial numbers.
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21. Miscellaneous.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-110.

A. Generally.

6. In general.

Pre-Code decisions as to the sufficiency of descriptions are still authority in the issue of whether a description “reasonably identifies that which is described.” *Piggott State Bank v. Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967).

7. Description by reference.

Description in security agreement, which made reference to supporting invoices that were subsequently prepared containing accurate description of merchandise purchased with charge account, was sufficient to create legally binding security interest. *In re Moody*, 62 B.R. 282 (Bankr. N.D. Miss. 1986).

Description of collateral in purchase-money security agreement by model and serial number alone meets requirements of UCC §§ 9-110 and 9-203(1)(b) where secured party is manufacturer or dealer in specialty appliances sold under a trade name. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978).

Under UCC § 9-105(1)(h), which defines security agreement as one which “creates or provides for” a security interest, promissory note which included line, “This note is secured by a Security Interest in subject personal property as per invoices,” qualified as security agreement; incorporation of invoices into promissory note by reference was sufficient description of collateral under UCC §§ 9-203(1)(b) and 9-110, when coupled with existence of financing statement containing more specific description. *In re Amex-Protein Dev. Corp.*, 504 F.2d 1056 (9th Cir. Cal. 1974).

Security agreement describing collateral as “furniture as per attached listing,” with no listing attached, did not adequately describe collateral. *J.K. Gill Co.*

v. Fireside Realty, Inc., 262 Or. 486, 499 P.2d 813 (1972).

8. Standard of sufficiency.

Description of collateral in financing statement as consumer goods, personal property of all kinds and types, located on or about debtor’s residence, not including household goods as defined in FTC rule, was sufficiently definite to permit perfection of security interest. *In re Boykins*, 120 B.R. 71 (Bankr. N.D. Miss. 1990).

Description of collateral in filed financing statement was sufficient under Texas UCC § 9-110 where statement contained nine separate pieces of information about the collateral, only one item of substance was incorrect, and great majority of other errors were minor and not likely to mislead any person who might examine the recorded statement. *McGehee v. Exchange Bank & Trust Co.*, 561 S.W.2d 926 (Tex. Civ. App. 1978), *ref. n.r.e.* (May 10, 1978).

UCC § 9-110, which deals with sufficiency of description of either personal property or real estate, was intended to reject requirement of detailed description and to make test of sufficiency simply that the description makes possible identification of thing described. *Mammoth Cave Prod. Credit Ass’n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Purpose of filing financing statement is notice to any third party; and requirement of description of collateral is satisfied if description reasonably informs third parties that certain identifiable item belonging to or in possession of debtor may be subject to prior security interest and that further inquiry is necessary to determine if it is exact item being offered them as collateral. *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala. App. 523, 274 So. 2d 80 (Civ. App. 1973).

Description of collateral contained in security agreement must be reasonably specific; and term “equipment” in omnibus clause of security agreement did not include two automobiles owned by debtor corporation. *In re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Description of collateral in security agreement is intended only to evidence agreement of parties and need only make possible identification of thing described.

United States v. First Nat'l Bank, 470 F.2d 944 (8th Cir. Neb. 1973).

Trust receipts meet the minimum requirements of the UCC where they are writings signed by the debtor granting security interests in specifically described merchandise to the distributor. In re United Thrift Stores, Inc., 363 F.2d 11 (3d Cir. N.J. 1966).

A financing statement is sufficient if it contains a statement indicating the types or describing the items of collateral and any description of personal property is sufficient whether or not it is specific if it reasonably identifies what it described. In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

A security agreement may be held to cover particular collateral even though such collateral is not specifically described. Thus, an agreement covering "All contents of luncheonette including equipment such as..." followed by an enumeration of particular items and containing a reference to "all property and articles now, and which may hereafter be, used...with [or] added...to...any of the foregoing described property" was sufficient to include a cash register which was to be used with some of the other equipment, even though the cash register was not specifically referred to. NCR v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963).

9. —Objective standard.

Where certain items of equipment were not described in security agreement covering debtor's drilling rigs, disputed items could not be included within security agreement by "external evidence" consisting of unsigned financing statement describing disputed items and evidence that debtor mortgaged and secured party took, pursuant to mortgage, security on all of debtor's equipment. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

In considering whether a security agreement covers particular collateral, the debtor's intent must be judged by the language of the security agreement and not by possible inferences from the surrounding circumstances. NCR v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963).

B. Particular Descriptions.

10. Accounts.

Description of collateral as "accounts receivable" sufficiently identified collateral as to put prospective creditor on notice of probability that security agreement did embrace present and future accounts receivable. South County Sand & Gravel Co. v. Bituminous Pavers Co., 106 R.I. 178, 256 A.2d 514 (1969).

Where bank held a security interest in debtor's inventory and accounts receivable currently owned and thereafter to be acquired, the financing statement reasonably identified the collateral which was described as "inventory and accounts receivable," and the omission of the word "future" was immaterial. In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

A financing statement covering "all present and future accounts receivable submitted" sufficiently identified the collateral security. Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960).

11. After-acquired property.

General description of collateral, which consisted of debtor's farming equipment, in financing statement filed by bank as "all equipment now owned or hereafter acquired by debtor," without indicating location of such equipment or its nature as farming equipment, was inadequate under UCC § 9-402(1) and § 9-110, and did not perfect bank's lien in collateral, so as to render it superior to right to collateral of trustee in bankruptcy. In re Werth, 443 F. Supp. 738 (D. Kan. 1977).

In bank's suit to have security interest in used-car dealer's inventory declared to be first and prior security interest as against interests of three persons to whom such inventory was transferred, where evidence showed that bank's security interest was perfected by filing, covered future advances, and gave bank security interest in all present and after-acquired property and proceeds; that one transferee took trust receipts and titles to specific vehicles to secure loans made to dealer and entered into security agreement granting security interest in vehicles identified in trust receipts, which agreement was filed after filing of bank's

security agreement; that second transferee took trust receipts as security for loans made to dealer, but did not enter into security agreement with dealer; and that third transferee's purchase for resale of over half of dealer's inventory may have been financed by first transferee, (1) under UCC § 9-110, description of collateral in bank's security agreement included all of dealer's inventory and proceeds therefrom; (2) under UCC § 9-205, alleged failure of bank to supervise dealer's inventory properly could not constitute basis for denying equitable relief to bank; (3) security interest of first transferee was junior to bank's security interest because it was perfected after perfection of bank's interest; (4) security interest of second transferee was junior to bank's security interest because it was never perfected; and (5) security interest of third transferee was also subject to bank's security interest because such transferee was bulk purchaser under UCC § 1-201(9) and not buyer in ordinary course of business under UCC § 9-307(1). *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977).

Order directing seizure of tractors and trailers which were listed as collateral in security agreement and which had been sold by debtor to defendants could not stand where there was factual question as to whether, under UCC § 9-306(2), creditor, by reason of its prior dealings with debtor, had authorized it to sell chattels free of any liens by asserting its right to receive "proceeds" if chattels were sold; order directing seizure of trailer not specifically mentioned in security agreement was improper under UCC §§ 9-110 and 9-203(1)(b) where general language in after-acquired property clause of security agreement was insufficient to cover vehicles other than those specifically listed, unless they were given and accepted in replacement of specified vehicles. *Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118 (2d Dep't 1974).

Description of collateral in security agreement is intended only to evidence agreement of parties and need only make possible identification of thing described; and description of all farm and other equipment now owned or hereafter acquired by debtor was sufficient description

of after-acquired water irrigation equipment as collateral in which secured party had security interest. *United States v. First Nat'l Bank*, 470 F.2d 944 (8th Cir. Neb. 1973).

The description of collateral contained in financing statement ("Present and after-acquired accounts receivable") meets the requirements of UCC § 9-110. In *re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd*, 460 F.2d 1405 (5th Cir. Ga. 1972).

Description of collateral as "accounts receivable" sufficiently identified collateral as to put prospective creditor on notice of probability that security agreement did embrace present and future accounts receivable. *South County Sand & Gravel Co. v. Bituminous Pavers Co.*, 106 R.I. 178, 256 A.2d 514 (1969).

Where bank held a security interest in debtor's inventory and accounts receivable currently owned and thereafter to be acquired, the financing statement reasonably identified the collateral which was described as "inventory and accounts receivable," and the omission of the word "future" was immaterial. In *re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

"All after acquired property of like kind" is a sufficient description under this section. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

A provision of the security agreement that it applies "to all collateral of the kind which is subject to this agreement which debtor may acquire at any time" manifests a clear intent to include future inventory of the debtor. *Thomson v. O.M. Scott Credit Corp.*, 28 Pa. D. & C.2d 85 (1962).

12. Construction equipment.

Under UCC § 9-110, description of collateral in security agreement was sufficient to include a caterpillar motor grader where description referred to "all earth movers, blades, rollers, laydown machines, trucks, automobiles, and pickup trucks owned by, or in which the debtor has an interest, and now located at debtor's place of business." *Empire Mach. Co. v. Union Rock & Materials Corp.*, 119 Ariz. 145, 579 P.2d 1115 (Ct. App. 1978).

The description of a caterpillar scraper by an incorrect serial number is insuffi-

cient in the absence of some physical description appearing of record in the security instrument which provides a key to the identity of the property. *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 134 S.E.2d 828 (1964).

The description of a certain "Unit" Model 614 Backhoe or shovel in security agreements and financing statements as "5/8 yd. Shovel, Deisel Unit, Booms, Drag Buckets," "1951 Unit, 1/2 yd. Diesel Shovel, Model 614, Ser. 51636," and "1-Unit Model 614 Diesel Basic Machine with five operating clutches & power dipper trip, and dragline, Serial #61536," was sufficient. *National-Dime Bank v. Cleveland Bros. Equip. Co.*, 20 Pa. D. & C.2d 511 (1959).

13. Crops.

Security agreement did not contain sufficient description of land on which debtor's crops were to be grown, so that bank did not have valid security interest therein, where agreement did nothing to identify land other than to specify its acreage and county in which is was located. *In re Byrd*, 66 B.R. 261 (Bankr. N.D. Miss. 1986).

Description of collateral as crops and "proceeds" from crops was sufficient to include federal subsidy payments to which debtor became entitled. *In re Munger*, 495 F.2d 511 (9th Cir. Cal. 1974).

Where financing statement and security agreement purportedly gave secured party security interest in all of debtor's crops, but contained accurate legal description of certain farm lands belonging to debtor and omitted 3 other parcels of land on which debtor planted and harvested crops, crop description was insufficient to put third person on notice under UCC. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972).

Although §§ 9-402 and 9-110 were intended by legislature to require something less than legal description of land to apprise purchasers and creditors of security interest in growing crops, financing statement which described realty on which crops were raised as "land owned or leased by debtor in Cherokee County, Kansas" was insufficient to perfect security interest in such crops. *Chanute Prod.*

Credit Ass'n v. Weir Grain & Supply, Inc., 210 Kan. 181, 499 P.2d 517 (1972).

A description of seven acres of crops to be produced on the land of a named individual is insufficient since it failed to show that the debtor grew exactly seven acres of crops on the land and that no one else grew any crops there. *Piggott State Bank v. Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967).

14. Farm implements.

Under UCC § 9-402(1) and UCC § 9-110, term "farm equipment" was sufficiently specific description of tractor to perfect security interest therein of federal Farmers Home Administration (FHA), since any reasonable third party who might consider accepting tractor as collateral would receive ample notice from secured party's filed financing statement that further inquiry was in order. *United States v. Crittenden*, 600 F.2d 478 (5th Cir. Ga. 1979).

General description of collateral, which consisted of debtor's farming equipment, in financing statement filed by bank as "all equipment now owned or hereafter acquired by debtor," without indicating location of such equipment or its nature as farming equipment, was inadequate under UCC § 9-402(1) and § 9-110, and did not perfect bank's lien in collateral, so as to render it superior to right to collateral of trustee in bankruptcy. *In re Werth*, 443 F. Supp. 738 (D. Kan. 1977).

Tools are ordinarily defined as implements used by hand, and use of words "tilling and harvesting tools" in financing statement did not accurately describe power-driven farm machinery such as mower, reaper, fertilizer, so as to perfect security interests in those items. *In re Anselm*, 344 F. Supp. 544 (W.D. Ky. 1972).

15. Generalized descriptions.

Where security agreement described collateral as follows: "Machinery equipment and fixtures; Molds, tools, dyes, component parts including specifically (certain described molds)," description was sufficient to satisfy UCC § 9-110 and it included not only the specifically described molds but also the debtor's other "machinery, equipment and fixtures." In

re Sarex Corp., 509 F.2d 689 (2d Cir. N.Y. 1975).

Financing statement containing signatures of debtor and secured party, address of secured party, and containing description of collateral: "All Olivetti Corp. of America copying machines which have been delivered but not paid in full" met sufficiency test of description of collateral under UCC § 9-110 and formal requisites of financing statement under UCC § 9-402 and description reflected security interest under UCC § 1-201(37). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Collateral listed in financing statement as "refrigerators" was sufficient to cover flower box refrigeration unit. *Beneficial Fin. Co. v. Van Shaw*, 476 S.W.2d 772 (Tex. Civ. App. 1972).

Financing statement covering "all personal property" did not describe property by type or description and was inadequate to perfect security interest, since it did not substantially comply with all statutory requirements, and errors were more than minor within meaning of § 9-402(5). *In re Fuqua*, 461 F.2d 1186 (10th Cir. Kan. 1972).

"All furniture, fixtures, and equipment now owned and hereafter acquired by the borrower" reasonably identifies collateral subject to a security interest. *United States v. Antenna Sys.*, 251 F. Supp. 1013 (D.N.H. 1966).

A security agreement may be held to cover particular collateral even though such collateral is not specifically described. Thus, an agreement covering "All contents of luncheonette including equipment such as..." followed by an enumeration of particular items and containing a reference to "all property and articles now, and which may hereafter be, used...with [or] added...to...any of the foregoing described property" was sufficient to include a cash register which was to be used with some of the other equipment, even though the cash register was not specifically referred to. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

16. Inventory.

Trial court erred in holding that description within security agreement giving on lien on "Company owned inventory"

was insufficient identification of secured property; held, fact issue was raised as to whether goods could possibly be identified under agreement. *Security Tire & Rubber Co. v. Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969).

A description of goods as "inventory" is sufficient. To require more, such as an enumeration of all the types of articles handled, would be unreasonably burdensome and neither within the letter or the spirit of the Code. Moreover, a person selling to a retailer must be aware of the character of his goods and the disposition contemplated by him and that the goods would become inventory and therefore be subject to any security agreement declaring a security interest in future inventory. *Thomson v. O.M. Scott Credit Corp.*, 28 Pa. D. & C.2d 85 (1962).

17. Livestock.

Where security agreement covering herd of cattle described collateral as "84 Holstein Cows and 14 Holstein Heifers, 1 to 2 ½ years of age," description of collateral was sufficient under UCC § 9-110 to create enforceable security interest under UCC § 9-203(1)(b); furthermore, where security agreement provided that debtors had "right to sell cows that ceased to be productive or to otherwise cull the herd; but they shall at all times retain a sufficient number of replacement heifers, or otherwise provide satisfactory replacements, to maintain a herd not smaller than that being now purchased" and that "Buyers agree to grant t[sic] Sellers a lien upon said property [cattle] and upon the replacements therefor..." use of term "replacement" was adequate to create security interest in after-acquired property (i.e., cattle) under UCC § 9-204(3). *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

Where first purchase money mortgage described the secured property as "fifty one (51) head of Holstein heifers with increase" and second purchase money mortgage describes the property as "twenty four (24) Holstein heifers with increase", held, description is not so inexact as to render security instrument defective, but it is sufficiently uncertain, where other Holstein cattle are owned by the debtor, to cast a substantial burden

upon the purchase money mortgagee to be able to clearly identify collateral in order to obtain a priority interest over another holder of a security interest. *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

18. Motor vehicles and boats.

Financing statement that covered boat was valid, notwithstanding figures which showed year of manufacture and constituted part of description of boat were erroneous by one year. *Adams v. Nuffer*, 550 P.2d 181 (Utah 1976).

Unlike a financing statement which is designed merely to put creditors on notice that further inquiry is prudent, a security agreement embodies the intentions of the parties and is the primary source to which a creditor's or potential creditor's inquiry is directed and must be reasonably specific; thus term "equipment" in omnibus clause of security agreement did not include automobiles owned by bankrupt corporation. *In re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Use of letters "COF" in a financing statement describing a model of tractor known as "Cab over tandum" with appropriate serial numbers was sufficient to meet requirements of definite description imposed by UCC § 9-110, even though financing statement failed to indicate what initials "COF" stood for. *In re Richards*, 455 F.2d 281 (6th Cir. Mich. 1972).

Repair order reserving security interest in automobile in dealer's favor and signed by customer adequately described automobile within meaning of Code § 9-203 by means of notations as to brand of automobile, year, model, speedometer reading and license number. *River Oaks Chrysler-Plymouth, Inc. v. Barfield*, 482 S.W.2d 925 (Tex. Civ. App. 1972).

The necessity of listing by serial number property used as collateral in a security agreement was removed by the Uniform Commercial Code, and a description of two automobiles as passenger and commercial automobiles financed by a bank was sufficient. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

The description of two automobiles, in a security agreement between a bank and

an automobile dealer, as "passenger and commercial automobiles" financed by the bank, was sufficient, considering the nature of the agreement, the nature of the business of the two parties and the business practices of automobile dealers and their financing agents, since it made possible the identification of the property intended to be covered by the agreement. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

19. Serial numbers.

Description of collateral in purchase-money security agreement by model and serial number alone meets requirements of UCC §§ 9-110 and 9-203(1)(b) where secured party is manufacturer or dealer in specialty appliances sold under a trade name. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978).

Where, after wrecked tractor was repaired, salvaged parts not used in repair and consisting of cab, front axle and chassis, engine, consisting of engine block and crank, together with other parts, some new and some salvage from other vehicles, were used to rebuild another tractor, security agreement and financing statement containing identification of tractor built from salvage parts in terms of year of original tractor and original Vehicle Identification Number as imprinted on salvaged engine block contained sufficient description of collateral to satisfy UCC. *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973).

Use of letters "COF" in a financing statement describing a model of tractor known as "Cab over tandum" with appropriate serial numbers was sufficient to meet requirements of definite description imposed by UCC § 9-110, even though financing statement failed to indicate what initials "COF" stood for. *In re Richards*, 455 F.2d 281 (6th Cir. Mich. 1972).

The description of a certain "Unit" Model 614 Backhoe or shovel in security agreements and financing statements as "5/8 yd. Shovel, Deisel Unit, Booms, Drag Buckets," "1951 Unit, 1/2 yd. Diesel Shovel, Model 614, Ser. 51636," and "1-Unit Model 614 Diesel Basic Machine with five oper-

ating clutches & power dipper trip, and dragline, Serial #61536," was sufficient. *National-Dime Bank v. Cleveland Bros. Equip. Co.*, 20 Pa. D. & C.2d 511 (1959).

The necessity of listing by serial number property used as collateral in a security agreement was removed by the Uniform Commercial Code, and a description of two automobiles as passenger and commercial automobiles financed by a bank was sufficient. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

20. —Erroneous serial numbers.

Where description of printing press contained in equipment lease and financing statement was reasonably sufficient to permit identification of collateral under UCC § 9-110, it was sufficient to create enforceable security interest, notwithstanding description of press contained in equipment lease included incorrect serial number. *Matter of Vintage Press, Inc.*, 1977, 552 F. 2d 1145

Security agreement and financing statement adequately described collateral

as required by UCC §§ 9-203, 9-402, and 9-110 where, although secured party had erroneously omitted first digit of identification number of automobile, omitted digit represented information previously described in words on each document. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

21. Miscellaneous.

Where security agreement and financing statement described collateral as watch and also identified watch by brand and model number, description of collateral was sufficient under UCC § 9-110; where security agreement described second item of collateral as, "ladies' bridal set white gold," but financing statement described collateral as, "one ladies' bracelet set-white gold," description of collateral in security agreement was sufficient to create security interest but description in financing statement did not reasonably identify collateral and thus secured party did not have perfected security interest in bridal set. *DWG, Inc. v. Peltier*, 563 P.2d 152 (Okla. 1977).

RESEARCH REFERENCES

ALR. Sufficiency of description of property, as against third persons, in chattel mortgage on farm equipment, machinery, implements, and the like. 32 A.L.R.2d 929.

Sufficiency of description in chattel mortgage as covering all property of a particular kind. 2 A.L.R.3d 839.

Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402. 100 A.L.R.3d 10.

Sufficiency of description of collateral in security agreement under UCC §§ 9-110

and 9-203. 100 A.L.R.3d 940.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 192 et seq.

6 Am. Jur. Pl & Pr Forms, Secured Transactions, Forms 9:71-9:72 (sufficiency of description).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3001 et seq (sufficiency of description).

CJS. 79 C.J.S., Secured Transactions §§ 46, 68.

SUBPART 2.

APPLICABILITY OF ARTICLE.

SEC.

75-9-109. Scope.

75-9-110. Security interests arising under Article 2 or 2A.

§ 75-9-109. Scope.

(a) Except as otherwise provided in subsections (c) and (d), this article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under Section 75-2-401, 75-2-505, 75-2-711(3), or 75-2A-508(5), as provided in Section 75-9-110; and

(6) A security interest arising under Section 75-4-210 or 75-5-118.

(b) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(c) This article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this article;

(2) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(3) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 75-5-114.

(d) This article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

(2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 75-9-333 applies with respect to priority of the lien;

(3) An assignment of a claim for wages, salary, or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 75-9-315 and 75-9-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or set-off, but:

(A) Section 75-9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) Section 75-9-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) Liens on real property in Sections 75-9-203 and 75-9-308;

(B) Fixtures in Section 75-9-334;

(C) Fixture filings in Sections 75-9-501, 75-9-502, 75-9-512, 75-9-516, and 75-9-519; and

(D) Security agreements covering personal and real property in Section 75-9-604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but Sections 75-9-315 and 75-9-322 apply with respect to proceeds and priorities in proceeds; or

(13) To a transfer by this state or a governmental unit of this state.

SOURCES: Former 1972 Code § 75-9-109 [Codes, 1942, § 41A:9-109; Laws, 1966, ch. 316, § 9-109] is now found in comparable provisions enacted at § 75-9-102 by Laws, 2001, ch. 495, § 1. Present § 75-9-109 derived from former 1972 Code §§ 75-9-102 [Codes, 1942, § 41A:9-102; Laws, 1966, ch. 316, § 9-102; Laws, 1977, ch. 452, § 5] and 75-9-104 [Codes, 1942, § 41A:9-104; Laws, 1966, ch. 316, § 9-104; Laws, 1977, ch. 452, § 7; Laws, 1996, ch. 460, § 22] and was enacted by Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 5, eff from and after passage (approved Mar. 20, 2002.)

Amendment Notes — The 2002 amendment deleted former (c)(2) and redesignated former (c)(3) and (c)(4) as present (c)(2) and (c)(3); and rewrote (d)(13).

Cross References — Statutory definition of personal property, see § 1-3-41.

Mobile home being personal property for the purpose of a security interest therein, see § 27-53-15.

Motor vehicle sales finance law, see §§ 63-19-1 et seq.

Security interests under motor vehicle titles law, see §§ 63-21-1 et seq.

Assignment or pledge of wages, see § 71-1-45.

Territorial application of Code, see § 75-1-105.

Sale on approval and sale or return; consignment sales and rights of creditors, see § 75-2-326.

Sale of lease contract, see § 75-2A-303.

General effectiveness of security agreement, see § 75-9-201.

Liens, generally, see §§ 85-7-1 et seq.

Landlord's lien, see §§ 89-7-51, 89-7-53.

Uniform Federal Lien Registration Act, see §§ 85-8-1 et seq.

Security interest under condominium law, see § 89-9-9.

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I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-102.

A. In General.

6. Generally.

It is the clear policy of Article 9 to look to the substance, rather than to the form, of an agreement to determine whether or not it is a security agreement. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

A secured transaction is valid as between the parties without the filing required to obtain perfection as against third persons. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. Ark. 1969).

A security interest is an interest in property which secures payment for the performance of an obligation. Under Article 9 the UCC does not adopt a title or lien theory of security interests and rights and obligations and remedies are not determined by the location of the title, but rather on function, compliance with statutory requirements, and the nature of the transaction. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

A secured transaction is valid as between the parties without the filing required to obtain perfection as against third persons. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. Ark. 1969).

The holder of the security interest in goods retains title in the abstract where a purchase-financing transaction is entered into, whether the security device is a conditional sale or any of the other types mentioned in this section. *Commonwealth v. Two Ford Trucks*, 185 Pa. Super. 292, 137 A.2d 847 (1958).

7. Prior law compared.

The 1966 amendment of Official Comment 4 to UCC § 9-102, illustrating the operation of UCC § 9-102(3), produced two effects. First, the amendment's deletion of references to mortgages distinguishes between the pledge of a note, which is a separate and distinct contract, and the underlying real-estate mortgage. Thus, where a promissory note and real-estate mortgage together become the subject of a security interest, only that portion of the package which is unrelated to the real property is now covered by UCC § 9-102(3). Second, the added language in the amendment makes clear that the promissory note itself falls within the scope of Article 9 by virtue of its status as an instrument. *Rucker v. State Exch. Bank*, 355 So. 2d 171 (Fla. App. 1978).

Where a lease arrangement serves a commercial function closely analogous to such other common financing methods as conditional sales and chattel mortgages,

the parties involved should be subject to both the duties imposed by, and the protection afforded under, the Uniform Commercial Code and its interpretive case law. *Nevada Nat'l Bank v. Huff*, 94 Nev. 506, 582 P.2d 364 (1978) (lease of pickup truck).

Substitution by Uniform Commercial Code of concept of security interest for such pre-Code security devices as chattel mortgage or conditional sales contract did not render criminal statute-which made it offense for one who had mortgaged personal property to another, or who had possession of personal property under contract of sale whereby vendor retained title to property, to remove such property from county where it was located-inapplicable to secured transactions under Uniform Commercial Code, since mere use of chattel mortgage or conditional sales contract after effective date of adoption of Uniform Commercial Code will not, under UCC § 9-102(1)(a), defeat a security interest that is otherwise valid under the code's provisions. *State v. Denny*, 116 Ariz. 361, 569 P.2d 303 (Ct. App. 1977).

The UCC has eliminated the older, technical, and restricted categories of security interests; gone are the definitional difficulties and transactional fictions of the chattel mortgage, the conditional sale, and the trust receipt, establishing in their stead a general set of rules for the creation of a security interest in the secured party. *In re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

The instant section relieves the court of the burden of construing instruments as either chattel mortgages or conditional sales contracts, which was a critical factor to consider in security instruments prior to the adoption of the Uniform Commercial Code. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

The Pennsylvania Chattel Mortgage Act of 1945 was superseded by the Uniform Commercial Code. *In re Consorto Constr. Co.*, 212 F.2d 676 (3d Cir. Pa. 1954), *cert. denied*, 348 U.S. 833, 75 S. Ct. 57, 99 L. Ed. 657 (1954).

The Uniform Commercial Code created a new system of secured transactions and provided a method of safeguarding the

interests of creditors secured by personal property when the property remained in the hands of the debtors. *Commonwealth v. Davis*, 4 Pa. D. & C.2d 182 (1954).

8. Construction with other law.

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt, and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v.*

Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978) (applying New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under state bailment statute requiring recordation of leases of personal property "in the manner provided by law for the recording of [chattel] mortgages," trustee in bankruptcy was properly ordered to turn over leased equipment to lessor where lessor met filing requirements of UCC § 9-401 et seq.; although instruments in question were true leases and were excluded from coverage of Article 9 under UCC § 9-102(2), since lease does not create security interest under UCC § 1-201(37), bailment statute was not inconsistent with any provision of UCC and was not repealed by UCC § 10-103, the Code's general repealer. In re *Bazen*, 425 F. Supp. 1184 (D.S.C. 1977), aff'd, 571 F.2d 574 (4th Cir. S.C. 1978), aff'd sub nom. *First South Leasing Co. v. Abrams*, 571 F.2d 575 (4th Cir. S.C. 1978) (applying South Carolina law).

As secured transactions are not governed by the provisions of Article 2 it follows that the unconscionable section of the Code does not apply to a secured transaction and it is therefore no objection that the advantage that a creditor has under a secured transaction may appear inequitable or even unconscionable. In re *Advance Printing & Litho Co.*, 277 F. Supp. 101 (W.D. Pa. 1967), aff'd, 387 F.2d 952 (3d Cir. Pa. 1967).

A credit sale of heavy machinery under which the purchaser took back a security interest and note is not a loan requiring application of the Pennsylvania usury statute. *Equipment Fin., Inc. v. Grannas*, 207 Pa. Super. 363, 218 A.2d 81 (1966).

In a case where the issue was whether plaintiff had been guilty of a breach of

contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter and not under subsection (2) of said section in the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation and because the validity or perfection of the security interest were not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

9. —Federal law.

Uniform Commercial Code on secured transactions has been judicially adopted as federal common law. *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944 (N.D. Ind. 1975).

Conditional vendor's perfection of security interest in vessel, although sufficient under UCC Article 9, did not, by itself, under maritime lien law, establish his priority over subsequent maritime lienor. *Matthews v. Richmond*, 11 Wash. App. 703, 525 P.2d 810 (1974).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

10. Conflict of laws.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law

rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Where motor vehicle was purchased in Florida under contract executed in Florida, and security interest was created under Article 9 of UCC, and where vehicle was subsequently removed by debtor to state of Georgia where it was repossessed and resold by agent of secured party, Georgia law applied to repossession, resale, and right to deficiency judgment, absent agreement that law of other state would govern, since collateral was located in Georgia at time of repossession and resale. *Lewis v. First Nat'l Bank*, 134 Ga. App. 798, 216 S.E.2d 347 (1975).

In action involving determination of priority between lien resulting from attachment in California of trousers produced in foreign countries and consigned to purchaser in North Carolina, and bank's security interest resulting from financing agreements executed and filed in North Carolina, any right of bank was subordinate to attachment lien, where, pursuant to UCC § 9-102, the "situs" rule for choice of law applied, and where, under California law, bank had not perfected its security interest at time trousers were sited in California and were attached. *Joint Holdings & Trading Co. v. First Union Nat'l Bank*, 50 Cal. App. 3d 159 (2d Dist. 1975).

Under Georgia statute providing that if security interest was perfected under law of jurisdiction where vehicle was when security interest attached, and (a) if name of holder of security interest was shown on existing certificate of title issued by that

jurisdiction, his security interest continued perfected in Georgia, or (b) if name of holder of security interest was not shown on existing certificate title, security interest continued perfected in Georgia for six months after first certificate of title was issued in Georgia, Maryland bank with perfected security interest in automobile took priority over Georgia automobile dealer where bank financed purchase of automobile, Maryland certificate of title was issued to purchaser stating that automobile was subject to bank's security interest, purchaser subsequently forged a satisfaction of lien and delivered fraudulent alteration to State of Maryland, purchaser moved to Georgia, applied to Georgia Motor Vehicle Department for certificate of title which was issued to him free from liens in reliance on fraudulently altered Maryland documents, and purchaser, using Georgia title certificate, then sold automobile to dealer. Where issue is one of security interest perfection in motor vehicle, UCC yields to Motor Vehicle Certificate of Title Act. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Location of collateral at time of transaction determines governing law without regard to possible contacts in other jurisdictions. *First Nat'l Bank & Trust Co. v. Atlas Credit Corp.*, 417 F.2d 1081 (10th Cir. Okla. 1969) (applying Oklahoma law).

B. Exclusions.

11. In general.

3. The institution of distraint proceedings obviously does not fall within the intendment of this section. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

12. Landlords' liens.

Article 9 of UCC does not apply to statutory landlord's lien and, since landlord's statutory lien was not protected as security interest under UCC, it was not entitled to priority under § 6323(a) of Federal Tax Lien Act of 1966. On the other hand, contractual landlord's liens are not excluded from filing requirement of UCC and, therefore, landlord's contractual lien must have been properly filed to have priority over government's tax lien. *United States (Treasury Dep't, IRS) v.*

Globe Corp., 113 Ariz. 44, 546 P.2d 11 (1976).

13. Preemptive federal law.

The federal recording statute preempts the field of security interests in aircraft. *International Atlas Servs., Inc. v. Twentieth Century Aircraft Co.*, 251 Cal. App. 2d 434 (2d Dist. 1967), cert. denied, 389 U.S. 1038, 88 S. Ct. 775, 19 L. Ed. 2d 827 (1968).

Federal statute determines the priority as between the conditional seller of an airplane and the seller of parts added to the airplane. *International Atlas Servs., Inc. v. Twentieth Century Aircraft Co.*, 251 Cal. App. 2d 434 (2d Dist. 1967), cert. denied, 389 U.S. 1038, 88 S. Ct. 775, 19 L. Ed. 2d 827 (1968).

14. Real estate transactions.

Article 9 of Uniform Commercial Code applies only to creation of security interest in personal property or fixture and is not applicable to creation of real estate mortgage; thus, provisions of Uniform Commercial Code were not bar to action to foreclose mortgage. *State Nat'l Bank v. Dick*, 164 Conn. 523, 325 A.2d 235 (1973).

15. Effect of clause (3).

The 1966 amendment of Official Comment 4 to UCC § 9-102, illustrating the operation of UCC § 9-102(3), produced two effects. First, the amendment's deletion of references to mortgages distinguishes between the pledge of a note, which is a separate and distinct contract, and the underlying real-estate mortgage. Thus, where a promissory note and real-estate mortgage together become the subject of a security interest, only that portion of the package which is unrelated to the real property is now covered by UCC § 9-102(3). Second, the added language in the amendment makes clear that the promissory note itself falls within the scope of Article 9 by virtue of its status as an instrument. *Rucker v. State Exch. Bank*, 355 So. 2d 171 (Fla. App. 1978).

16. Title acts.

Under Georgia statute providing that if security interest was perfected under law of jurisdiction where vehicle was when security interest attached, and (a) if name of holder of security interest was shown on

existing certificate of title issued by that jurisdiction, his security interest continued perfected in Georgia, or (b) if name of holder of security interest was not shown on existing certificate title, security interest continued perfected in Georgia for six months after first certificate of title was issued in Georgia, Maryland bank with perfected security interest in automobile took priority over Georgia automobile dealer where bank financed purchase of automobile, Maryland certificate of title was issued to purchaser stating that automobile was subject to bank's security interest, purchaser subsequently forged a satisfaction of lien and delivered fraudulent alteration to State of Maryland, purchaser moved to Georgia, applied to Georgia Motor Vehicle Department for certificate of title which was issued to him free from liens in reliance on fraudulently altered Maryland documents, and purchaser, using Georgia title certificate, then sold automobile to dealer. Where issue is one of security interest perfection in motor vehicle, UCC yields to Motor Vehicle Certificate of Title Act. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

In Missouri the perfection of security interests in motor vehicles is not governed by the Code but by a special statute applicable thereto. *In re Jackson*, 268 F. Supp. 434 (E.D. Mo. 1967), *aff'd*, 385 F.2d 775 (8th Cir. Mo. 1967).

C. Transactions in Property or Fixtures.

17. In general.

California has omitted UCC § 9-313 relating to fixtures, and has altered UCC § 9-102, providing in new subdivision (1), subsection (c) that "as against third parties having or acquiring an interest in or a lien on the real property, the rights and duties of the parties to the secured transaction are governed by the law of this state relating to real property and fixtures," the California cases holding that a lessor gains no interest in fixtures which are installed by the lessee but owned by a third party. *EAC Credit Corp. v. Bass*, 21 Cal. App. 3d 645 (1st Dist. 1971).

Transactions between a bankrupt and its creditor claimant intended to create

a security interest are within the purview of Article 9 of the Uniform Commercial Code. *In re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

As a matter of definition no security interest can exist with respect to services of a debtor for the reason that collateral is limited to property. *Howarth v. Universal C.I.T. Credit Corp.*, 203 F. Supp. 279 (W.D. Pa. 1962).

This section relates to any transaction intended to create a security interest in personal property, and to any financing sale of accounts, contract rights or chattel paper. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

18. Intent.

Code provisions relating to secured transactions apply to any transactions (regardless of its form) which is intended to create security interest and particularly to chattel mortgages, conditional sales, or other lien or title retention contract. *Karp Bros. v. West Ward Sav. & Loan Ass'n*, 47 Pa. D. & C.2d 363 (1969), *aff'd*, 440 Pa. 583, 271 A.2d 493 (1970).

Where both the automobile dealer and the finance company were without any intention that the circumstances of the mistaken delivery of automobiles should have any effect as any kind of relationship, security or otherwise, arguments pertaining to the secured transactions rules of the Uniform Commercial Code were inapplicable with reference to the dispute between the parties. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

The principal test as to whether a transaction comes within the Secured Transaction Article is whether the transaction is intended to have effect as security. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

This section relates to any transaction intended to create a security interest in personal property, and to any financing sale of accounts, contract rights or chattel paper. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

19. Goods.

Where it is possible that some of the goods might not be "lawful" collateral, the transaction will be interpreted where pos-

sible as a cash sale of the goods which cannot be collateral and as a secured transaction merely as to the balance of the goods. In re Ter-A-Tom Assocs., 386 F.2d 90 (3d Cir. N.J. 1967) (question existed whether inventory of liquor could be collateral).

20. —Motor vehicles.

Two transactions involving motor vehicle liens which were filed with state division of motor vehicles were secured transactions within meaning of UCC § 9-102(1)(a); however, under UCC § 9-302(3)(b), persons having such liens were not required to file financial statements in order to perfect their security interests. Georgia-Pacific Corp. v. Consolidated Suppliers, Inc., 332 So. 2d 368 (Fla. Dist. Ct. App. 1st Dist. 1976).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months, was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of lessee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1), (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession charges. Avis Rent-A-Car Sys. v. Franklin, 82 Misc. 2d 66 (1975).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by a dealer who for automobiles used in its business executed installment sales contracts as both buyer and seller, the subsequent acceptance of an assignment of such installment sales contracts by the bank constituted a novation whereby financing under the installment

contracts was substituted for financing under the wholesale credit plan and the bank became the holder of a security interest in the vehicles within the meaning of subsection 1(a) of this section. Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 13 Pa. D. & C.2d 119 (1957).

21. General intangibles.

A state liquor license is a general intangible and is subject to the Code provisions governing security interests in such property. Paramount Fin. Co. v. United States, 13 Ohio Misc. 195, 379 F.2d 543 (6th Cir. Ohio 1967).

Liquor license was "property" which could be subjected to security interest under Article 9 of UCC. Gibson v. Alaska Alcoholic Beverage Control Bd., 377 F. Supp. 151 (D. Alaska 1974) (applying Alaska law).

22. Chattel paper or accounts.

Under UCC § 9-102(1) and UCC § 1-201(37), Article 9 applies not only to any transaction that is intended to create security interest in chattel paper, accounts, or contract rights, but also to any sale of accounts, contract rights, or chattel paper. Ralston Purina Co. v. Detwiler, 173 Ind. App. 513, 364 N.E.2d 180 (1977).

Substitution by Uniform Commercial Code of concept of security interest for such pre-Code security devices as chattel mortgage or conditional sales contract did not render criminal statute—which made it offense for one who had mortgaged personal property to another, or who had possession of personal property under contract of sale whereby vendor retained title to property, to remove such property from county where it was located—inapplicable to secured transactions under Uniform Commercial Code, since mere use of chattel mortgage or conditional sales contract after effective date of adoption of Uniform Commercial Code will not, under UCC § 9-102(1)(a), defeat a security interest that is otherwise valid under the code's provisions. State v. Denny, 116 Ariz. 361, 569 P.2d 303 (Ct. App. 1977).

UCC § 9-106 differentiates an "account" from a "contract right" in that an "account" is a right to payment that has been earned by performance while a "contract right" is a right to payment to be

earned in the future; once the right to payment has been earned, the contract right is extinguished and an account arises; while the distinction may have little significance (1971 Editorial Board Recommendation for UCC was that term "contract right" be eliminated as unnecessary), they are distinct categories of property each of which may serve as collateral in secured transaction under UCC § 9-102(1)(a). *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

Under Article 9, all forms of secured transactions, such as conditional sales and chattel mortgages, are treated in the same manner. *Miller v. Bonafied Ready Mix Corp.*, 4 U.C.C. Rep. Serv. 881 (1967, NY Sup).

D. Security Devices.

23. In general.

Code provisions relating to secured transactions apply to any transactions (regardless of its form) which is intended to create security interest and particularly to chattel mortgages, conditional sales, or other lien or title retention contract. *Karp Bros. v. West Ward Sav. & Loan Ass'n*, 47 Pa. D. & C.2d 363 (1969), *aff'd*, 440 Pa. 583, 271 A.2d 493 (1970).

The principal test as to whether a transaction comes within the Secured Transaction Article is whether the transaction is intended to have effect as security. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

24. Assignments.

A vendor, by making an unconditional assignment of his note and deed of trust to a bank, and by filing that assignment in the Chancery Clerk's office conjunctive with an erroneous pay-off figure given by the bank to the closing attorney for a second bank which lent purchasers money secured by the real estate, required that the vendor's deed of trust be subordinated to the second bank's deed of trust. *Cain v. Robinson*, 523 So. 2d 29 (Miss. 1988).

Debtors, as owners of collateral, were not parties to purported oral assignment between judgment creditors to adverse claimant who had satisfied judgment; adverse claimant, who was attorney, himself

referred to collateral as security; held, assignment was intended as security and not as mere satisfaction of judgment. *Frank v. Von Stith*, 123 Ill. App. 2d 239, 263 N.E.2d 259 (1st Dist. 1970).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by a dealer who for automobiles used in its business executed installment sales contracts as both buyer and seller, the subsequent acceptance of an assignment of such installment sales contracts by the bank constituted a novation whereby financing under the installment contracts was substituted for financing under the wholesale credit plan and the bank became the holder of a security interest in the vehicles within the meaning of subsection 1(a) of this section. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

25. Chattel mortgages.

As between the parties, a chattel mortgage is a secured transaction. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

A chattel mortgage is a secured transaction within the meaning of this section. *Lonoke Prod. Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964).

A chattel mortgage instrument qualifies as a security agreement under the Code. *In re Kelley*, 54 Berks C.L.J. 106 (Pa).

26. Conditional sales.

Where document evidencing transaction involving walk-in food freezer was titled "Contract of Sale and Agreement," parties termed themselves buyer and seller and expressed desire to consummate sale of freezer, monthly payments of "rent" were in reality interest on deferred purchase price, transaction was conditional sale, rather than lease, and contract created security interest in seller; and since seller never filed financing statement to perfect his security interest, perfected security interest of Small Business Administration in buyer's equipment and fixtures had priority. *Witmer v. Kleppe*, 469 F.2d 1245 (4th Cir. W. Va. 1972) (applying West Virginia law).

This article as appearing in the Arkansas Uniform Commercial Code governed a "conditional sales contract note" covering

carpeting, bedding and furniture supplied to a nonprofit corporation. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

The security interest of a conditional seller is not destroyed because the buyer has used the property in question—an automobile—in the illegal transportation of liquor and the property is forfeited by the state government. Accordingly the court will direct that the secured party be paid the amount of his debt from the proceeds of the sale of the property. *Commonwealth v. One 1960 Chevrolet*, 78 Dauph. Co. 154 (Pa).

27. Consignments.

As a result of the definition of “security interest” in UCC § 1-201(37) and the provisions of UCC § 9-102(2), only those consignments intended as security are directly subject to the provisions of UCC Art 9 concerning secured transactions, but all consignments, whether intended as security or not, are subject to the requirements of UCC § 2-326, which is in UCC Art 2 dealing with sales. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Where the consignee of ladies’ accessories entered an agreement with a manufacturer of ladies’ gloves, whereby the manufacturer would deliver gloves on consignment directly to stores with title to the gloves remaining in the manufacturer and the consignee receiving a commission for having arranged the retail sales, and the goods were never delivered to the consignee’s place of business; the assignee of creditors of the consignee had no right to merchandise remaining in possession of the manufacturer previously consigned nor to any proceeds received by the manufacturer from the sale of merchandise previously consigned. In *re Mincow Bag Co.*, 29 A.D.2d 400 (1st Dep’t 1968), *aff’d*, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

A true consignment of merchandise intended for sale in which there is no obligation to pay for the goods unless they are sold is not subject to this Article except as provided in § 2-326. In *re Mincow Bag Co.*, 53 Misc. 2d 599 (1967), *aff’d*, 29 A.D.2d 400, 288 N.Y.S.2d 364 (1st Dep’t

1968), *aff’d*, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

28. Factors’ liens.

“Bill of sale” describing automobile, setting out terms of payment, providing that bankrupt shall insure auto until he has paid for it in full, and signed by both parties did not satisfy requirements of written security agreement under UCC, even though in addition bankrupt had signed Application for Missouri title designating a first lien in favor of plaintiff. *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. Mo. 1973).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company’s retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company’s failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

UCC § 9-106 differentiates an “account” from a “contract right” in that an “account” is a right to payment that has been earned by performance while a “contract right” is a right to payment to be earned in the future; once the right to payment has been earned, the contract right is extinguished and an account arises; while the distinction may have little significance (1971 Editorial Board Recommendation for UCC was that term “contract right” be eliminated as unnecessary), they are distinct categories of property each of which may serve as collateral in secured transaction under UCC § 9-102(1)(a). *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

Factor’s common law liens are not affected by the Code. In *re Summit Hdwe., Inc.*, 20 Ohio Op. 2d 426, 302 F.2d 397, 96 A.L.R.2d 717 (6th Cir. Ohio 1962), cert. denied, 371 U.S. 882, 83 S. Ct. 154, 9 L. Ed. 2d 118 (1962).

The Code displaces factor's lien acts. In *re Freeman*, 294 F.2d 126 (3d Cir. N.J. 1961) (dictum).

A manufacturer who delivers goods to a retailer on credit is not a factor within a factor's lien law but may protect his interest by means of a security agreement under the Code. In *re Freeman*, 294 F.2d 126 (3d Cir. N.J. 1961) (dictum as to effect of the Code).

29. Leases creating security interests.

Under UCC § 9-102(1)(a) and (2) and UCC § 1-201(37), contract for lease of automobile was lease intended for security and not "pure lease" where it provided, among other things, (1) that on termination of agreement prior to expiration of fixed term, lessee was to return vehicle to lessor, (2) that lessor was then obligated to accept highest available cash offer at wholesale for vehicle and to notify lessee of any "gain or loss," which was difference between wholesale price accepted for vehicle and its "termination value" as determined by formula contained in lease agreement, (3) that lessee would owe lessor "depreciation value" of vehicle, as offset by amount received from its disposition at wholesale, and would receive from lessor any "gain" over such "depreciation value," (4) that lessee would have to pay all license fees and taxes, and (5) that lessee would also have to pay amounts specifically denominated as "sales tax" and "security deposit." *Bill Swad Leasing Co. v. Stikes*, 571 F.2d 1361 (5th Cir. Ala. 1978) (applying Alabama and Ohio law; stating that termination formula of lease recognized lessee's equity in leased vehicle, that required security deposit of \$1,000 was equivalent of down payment on vehicle, and that fact that lease agreement did not contain option to purchase was not controlling).

Lease was "one intended for security" and, hence, was security agreement as defined by UCC § 1-201(37), rather than true lease, where, *inter alia*, lessee had option to purchase, had right to apply 93% of rentals against purchase price of equipment, and was liable for full rental for entire minimum period though property was returned lessor; since lessor did not file financing statement covering leased equipment, its rights were subordinate to

those of creditors of lessee who obtained perfected security interest in equipment. *Percival Constr. Co. v. Miller & Miller Auctioneers, Inc.*, 387 F. Supp. 882 (W.D. Okla. 1973), *aff'd*, 532 F.2d 166 (10th Cir. Okla. 1976) (applying Oklahoma law).

Under UCC § 1-201(37) and UCC § 9-102(2), purported five-year "lease" of printing equipment was actually installment-sale contract which provided for an excessive rate of interest that rendered the contract void for usury where (1) lessor was finance company that was actually engaged in financing the sale of such printing equipment; (2) all risk of loss or damage to leased property was placed on lessee; (3) contract provided same remedies on lessee's default in payment of rent, even at end of first month, that would be available to a conditional seller or a mortgagee on a similar delinquency; (4) contract expressly provided that lessee, at lessor's request, would join lessor in executing financial statements pursuant to the Uniform Commercial Code; and (5) lessee, after all payments had been made under the purported "lease," could acquire title to the leased property by paying lessor nominal sum therefor. *Bell v. Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months, was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of lessee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1), (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to

repossession as well as repossession charges. *Avis Rent-A-Car Sys. v. Franklin*, 82 Misc. 2d 66 (1975).

Five-year equipment leases, containing options to purchase for nominal price at conclusion at lease term, were security agreements within meaning of UCC and, thus, were governed by UCC. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

Contract which required plaintiff to purchase sophisticated billing machine and lease it to defendant for 5 years and 4 months at fixed monthly rental, with option to defendant of renewing lease at its expiration for yearly rental in same amount at monthly rental during term, was "title retention contract and lease intended as a security" to which Article 9, rather than Article 2, of UCC applied. *Leasco Data Processing Equip. Corp. v. Starline Overseas Corp.*, 74 Misc. 2d 898 (1973), *aff'd*, 45 A.D.2d 992, 360 N.Y.S.2d 199 (1st Dep't 1974), appeal dismissed, 35 N.Y.2d 645 (1974), appeal dismissed, 35 N.Y.2d 963, 365 N.Y.S.2d 179, 324 N.E.2d 557 (1974).

Code provisions are applicable to "bailment lease" involving restaurant equipment on property subject to mortgage. *Karp Bros. v. West Ward Sav. & Loan Ass'n*, 47 Pa. D. & C.2d 363 (1969), *aff'd*, 440 Pa. 583, 271 A.2d 493 (1970).

A lease-purchase agreement covering air compressing machine which provided that 85 percent of the rental was to be applied on the specified purchase price of the machinery was a security interest created by contract. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963) (applying Pennsylvania law).

30. —Not creating security interests.

Lease of radio equipment for five years at agreed price, with title to property remaining in lessor and with possession of equipment to be returned to lessor at expiration of lease, did not constitute "security interest". *McGuire v. Associates Capital Servs. Corp.*, 133 Ga. App. 408, 210 S.E.2d 862 (1974).

Where plaintiff and defendant entered into agreement which purported to be lease of accounting machine manufactured by third party, where agreement

provided that defendant would make 60 monthly payments \$150.05 to plaintiff and that at end of lease period, five years, defendant would have option to purchase machine for 10 percent of its initial cost, and where defendant defaulted after making nine payments, plaintiff replevied machine, sold it at private sale, and brought action against defendant to recover balance due under lease, trial court did not err in finding that transaction was lease, not security interest, that it was not subject to UCC Article 9, and that plaintiff was entitled to deficiency judgment, notwithstanding plaintiff failed to notify defendant of sale pursuant to UCC § 9-504(3); without evidence of market value of machine at termination of lease, it could not be said that option to purchase for 10 percent of original purchase price was option to purchase for "nominal consideration" within meaning of UCC § 1-201(37). *Granite Equip. Leasing Corp. v. Acme Pump Co.*, 165 Conn. 364, 335 A.2d 294 (1973).

A lease of newspaper composing room equipment specifically stating it contained the entire agreement between the parties, providing that lessee acquired no interest in leased property except that of use, and giving lessor right to demand and take possession of property on termination of lease or in event of default was a bona fide lease, and lessor was not required to file a financing statement to preserve its right of possession after default. *In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

31. Promissory notes.

The 1966 amendment of Official Comment 4 to UCC § 9-102, illustrating the operation of UCC § 9-102(3), produced two effects. First, the amendment's deletion of references to mortgages distinguishes between the pledge of a note, which is a separate and distinct contract, and the underlying real-estate mortgage. Thus, where a promissory note and real-estate mortgage together become the subject of a security interest, only that portion of the package which is unrelated to the real property is now covered by UCC § 9-102(3). Second, the added language in the amendment makes clear that the

promissory note itself falls within the scope of Article 9 by virtue of its status as an instrument. *Rucker v. State Exch. Bank*, 355 So. 2d 171 (Fla. App. 1978).

Cable television installation agreements used as collateral to secure payment of promissory notes due former limited partner were "general intangibles" under UCC § 9-102(1)(a), and were not affected by UCC § 9-104(f), exclusion of "contract rights" from perfecting of valid security interests, where none of rights under security transaction were for payment of money and it was not contested that parties intended to create security interests. *Dynair Elecs. Inc. v. Video Cable, Inc.*, 55 Cal. App. 3d 11 (4th Dist. 1976).

32. Purchase money security interests.

Purchase money security interests are not loans under any of the provisions of this article, nor does it attempt to regulate financing charges—approving, apparently a "time price differential" on credit sales. *Equipment Fin., Inc. v. Grannas*, 207 Pa. Super. 363, 218 A.2d 81 (1966).

A vendor's security interest in the nature of a purchase money mortgage is recognized under the Code. *Thomson v. O.M. Scott Credit Corp.*, 28 Pa. D. & C.2d 85 (1962).

33. —After-acquired property.

Lien on retail inventory items subsequently acquired as replacement for original items subject to lien is "purchase money security interest" within meaning of California Commercial Code provision providing that with certain exceptions no nonpossessory security interest, other than purchase money security interest, may be given or taken in or to inventory of retail merchant. *Holzman v. L.H.J. Enters., Inc.*, 476 F.2d 949 (9th Cir. Cal. 1973), cert. denied, 414 U.S. 1135, 94 S. Ct. 878, 38 L. Ed. 2d 760 (1974).

The exception in UCC § 9-102(4) for purchase money security interests may extend to after-acquired property. In *re Piro*, 331 F. Supp. 171 (S.D. Cal. 1971), aff'd, 476 F.2d 949 (9th Cir. Cal. 1973) (applying California UCC).

34. Surety or guaranty.

A surety's interest in completing a construction project is not sufficient to be a

security interest "created by contract" under UCC § 9-102(2). *Alaska State Bank v. General Ins. Co. of Am.*, 579 P.2d 1362 (Alaska 1978).

Execution of guarantee was not Code transaction; guarantee was not "transaction ... which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975) (applying Mississippi law).

Guarantee was not "transaction ... which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a). *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975) (applying Mississippi law).

Surety claiming under terms of performance bond application was not entitled to equitable lien upon proceeds from sale of contractor's personal property, and did not have contract right but only security interest which it was required to file and perfect. *Aetna Cas. & Sur. Co. v. J.F. Brunken & Son*, 357 F. Supp. 290 (D.S.D. 1973) (applying South Dakota law).

Article 9 applies only to consensual security interests; thus, since surety's interest, arising in connection with bonding of public work's contractor, was not consensual, but derived from status inherent in being surety, Article 9 did not apply and conflict between rights of surety and secured third party would be resolved without reference to Article 9. *First Vt. Bank & Trust Co. v. Village of Poultney*, 134 Vt. 28, 349 A.2d 722 (1975).

35. —Subrogation.

Article 9 applies only to consensual security interests; thus, since surety's interest, arising in connection with bonding of public work's contractor, was not consensual, but derived from status inherent in being surety, Article 9 did not apply and conflict between rights of surety and secured third party would be resolved with-

out reference to Article 9. *First Vt. Bank & Trust Co. v. Village of Poultney*, 134 Vt. 28, 349 A.2d 722 (1975).

Subrogation rights are not "security interest" under UCC § 9-102(2). *United States Fid. & Guar. Co. v. First State Bank*, 208 Kan. 738, 494 P.2d 1149 (1972).

While Article 9 applies to security interests "created by contract," surety's right does not depend on contract and surety's claim to legal or equitable subrogation is not "security interest" under Article 9 of UCC, and is not affected by surety's failure to file financing statement. *United States Fid. & Guar. Co. v. First State Bank*, 208 Kan. 738, 494 P.2d 1149 (1972).

This chapter applies only to security interests created by contract and does not apply to the sureties on a defaulting general contractor's bond who, after payment of their principal's obligations for labor and materials furnished become subrogated to its rights to receive unpaid moneys due him under public contracts, and as between the sureties and the receivers for the defaulting contractor they are entitled to all sums then due to him. *Jacobs v. Northeastern Corp.*, 416 Pa. 417, 206 A.2d 49, 11 A.L.R.3d 1220 (1965).

36. Trust receipts.

Article 9 of UCC includes trust receipts and did not abolish them; consequently, guarantee agreement executed by guarantors covered indebtedness of debtor arising out of its trust receipt with creditor. *American Fiber Glass, Inc. v. GECC*, 529 S.W.2d 298 (Tex. Civ. App. 1975).

The failure to adhere to the form of a trust receipt does not render a sale one on open credit where the parties conducted themselves wholly consistently with an inventory security transaction. In *re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

A vendor's security interest in the nature of a trust receipt transaction is recognized under the Code. *Thomson v. O.M. Scott Credit Corp.*, 28 Pa. D. & C.2d 85 (1962).

E. Procedure.

37. In general.

Where charges, in prosecution for cheating by false pretenses, related to sale

of mortgaged personal property without notice to buyer of the mortgage, trial court did not err in denying motion to dismiss indictment on ground that personal-property mortgages had been abolished by Uniform Commercial Code, since UCC § 9-102(2) expressly recognizes continued existence of personal-property mortgages and Official Comment to that section makes clear that purpose of the code is not to abolish existing security devices, but to make legal relationships arising out of a particular security device depend on matters other than mere legal form of the device. *State v. Gullifer*, 384 A.2d 48 (Me. 1978).

Although Article 9 of UCC contains no specific provision establishing cause of action against third party for conversion of property upon which another holds a security interest, that omission does not preclude or preempt another remedy; thus, in absence of facts creating waiver or release or showing acquiescence or consent on part of secured party to sale of property covered by security agreement, auctioneer who sold cattle subject to security interest was liable to secured party for conversion of cattle. *Hills Bank & Trust Co. v. Arnold Cattle Co.*, 22 Ill. App. 3d 138, 316 N.E.2d 669 (3d Dist. 1974).

Where both the automobile dealer and the finance company were without any intention that the circumstances of the mistaken delivery of automobiles should have any effect as any kind of relationship, security or otherwise, arguments pertaining to the secured transactions rules of the Uniform Commercial Code were inapplicable with reference to the dispute between the parties. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

38. Grace period.

Since Code § 9-103(3) 4-month grace period from filing was designed to protect secured parties from debtors absconding with collateral, it does not apply to secured party who knowingly transferred collateral pursuant to non-negotiable bill of lading. In *re Automated Bookbinding Servs., Inc.*, 471 F.2d 546 (4th Cir. Md. 1972) (applying Maryland law).

Under Mississippi UCC assignee of automobile conditional sales contract was

not entitled to priority over trustee in bankruptcy, where assignee's security interest remained perfected for 4 months after automobile was brought into Mississippi from Alabama, at which time security interest expired since assignee did not comply with filing provisions of Code. In re Partain, 351 F. Supp. 750 (N.D. Miss. 1972).

39. Necessity of filing.

Two transactions involving motor vehicle liens which were filed with state division of motor vehicles were secured transactions within meaning of UCC § 9-102(1)(a); however, under UCC § 9-302(3)(b), persons having such liens were not required to file financial statements in order to perfect their security interests. Georgia-Pacific Corp. v. Consolidated Suppliers, Inc., 332 So. 2d 368 (Fla. Dist. Ct. App. 1st Dist. 1976).

40. Place of filing.

Under Georgia statute providing that if security interest was perfected under law of jurisdiction where vehicle was when security interest attached, and (a) if name of holder of security interest was shown on existing certificate of title issued by that jurisdiction, his security interest continued perfected in Georgia, or (b) if name of holder of security interest was not shown on existing certificate title, security interest continued perfected in Georgia for six months after first certificate of title was issued in Georgia, Maryland bank with perfected security interest in automobile took priority over Georgia automobile dealer where bank financed purchase of automobile, Maryland certificate of title was issued to purchaser stating that automobile was subject to bank's security interest, purchaser subsequently forged a satisfaction of lien and delivered fraudulent alteration to State of Maryland, purchaser moved to Georgia, applied to Georgia Motor Vehicle Department for certificate of title which was issued to him free from liens in reliance on fraudulently altered Maryland documents, and purchaser, using Georgia title certificate, then sold automobile to dealer. Where issue is one of security interest perfection in motor vehicle, UCC yields to Motor Vehicle Certificate of Title Act. Strother

Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Where creditor of New York lessor of heavy equipment, installed in New Jersey by New Jersey lessee, perfected security interest in equipment leases by New York filing did not perfect its interest in reversion in New Jersey where equipment was located, lessor's trustee in bankruptcy had priority with respect to equipment itself over creditor's unperfected security interest. In re Leasing Consultants, Inc., 351 F. Supp. 1390 (E.D.N.Y. 1972), remanded, 486 F.2d 367 (2d Cir. N.Y. 1973).

Where credit corporation perfected its purchase money security interest in boat in Connecticut and New York, but never perfected any security interest in Florida after debtor removed boat to that state, and after boat had been in Florida for 10 months bank financed purchased of boat from debtor who had obtained certificate of title falsely stating boat was free of lien, bank's lien was superior to lien of credit corporation under UCC § 9-103(3). GECC v. Hollywood Bank & Trust Co., 263 So. 2d 593 (Fla. App. 1972).

Where truck owner's chief place of business was in Michigan, perfection of security interest lien in truck by filing in Michigan was sufficient to protect lien from any and all subsequent financial transactions involving truck and from interests of out-of-state third parties, including bona fide purchaser for value without notice at execution sale in Florida, despite secured party's failure to intervene in Florida court proceedings after its attorney promised to do so. Powell v. Whirlpool Emp. Fed. Credit Union, 42 Mich. App. 228, 201 N.W.2d 683 (1972).

Filing at debtor's chief place of business was required to perfect security interest in equipment, and where conditional sale contract covering farm tractors was never filed anywhere, judgment creditor who executed and levied against tractors had claim superior to that of assignee of conditional sale contract. Central Nat'l Bank v. Wonderland Realty Corp., 38 Mich. App. 76, 195 N.W.2d 768 (1972).

41. Priority.

In action involving determination of priority between lien resulting from attachment in California of trousers produced in

foreign countries and consigned to purchaser in North Carolina, and bank's security interest resulting from financing agreements executed and filed in North Carolina, any right of bank was subordinate to attachment lien, where, pursuant to UCC § 9-102, the "situs" rule for choice of law applied, and where, under California law, bank had not perfected its security interest at time trousers were sited in California and were attached. *Joint Holdings & Trading Co. v. First Union Nat'l Bank*, 50 Cal. App. 3d 159 (2d Dist. 1975).

Under Georgia statute providing that if security interest was perfected under law of jurisdiction where vehicle was when security interest attached, and (a) if name of holder of security interest was shown on existing certificate of title issued by that jurisdiction, his security interest continued perfected in Georgia, or (b) if name of holder of security interest was not shown on existing certificate title, security interest continued perfected in Georgia for six months after first certificate of title was issued in Georgia, Maryland bank with perfected security interest in automobile took priority over Georgia automobile dealer where bank financed purchase of automobile, Maryland certificate of title was issued to purchaser stating that automobile was subject to bank's security interest, purchaser subsequently forged a satisfaction of lien and delivered fraudulent alteration to State of Maryland, purchaser moved to Georgia, applied to Georgia Motor Vehicle Department for certificate of title which was issued to him free from liens in reliance on fraudulently altered Maryland documents, and purchaser, using Georgia title certificate, then sold automobile to dealer. Where issue is one of security interest perfection in motor vehicle, UCC yields to Motor Vehicle Certificate of Title Act. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Under Mississippi UCC assignee of automobile conditional sales contract was not entitled to priority over trustee in bankruptcy, where assignee's security interest remained perfected for 4 months after automobile was brought into Mississippi from Alabama, at which time security interest expired since assignee did not

comply with filing provisions of Code. *In re Partain*, 351 F. Supp. 750 (N.D. Miss. 1972).

Lien obtained through attachment execution on partnership interest, after defendant had allegedly assigned interest to his attorney as collateral for fees and costs, took priority over rights of attorney-assignee; partnership interest came within definition of "general intangible" under UCC § 9-106, security interest therein was clearly within scope of security interests governed by article 9 of code under UCC § 9-102, and, inasmuch as no financing statement was filed under UCC § 9-302, such security interest was unperfected and plaintiff's lien, obtained through attachment execution, took priority under UCC § 9-301 over rights of defendant's attorney as holder of unperfected security interest of which plaintiff had no knowledge. *Med-Mar, Inc. v. Dilworth*, 96 Montg. County L. Rep. 91 (Pa. 1972).

Federal statute determines the priority as between the conditional seller of an airplane and the seller of parts added to the airplane. *International Atlas Servs., Inc. v. Twentieth Century Aircraft Co.*, 251 Cal. App. 2d 434 (2d Dist. 1967), cert. denied, 389 U.S. 1038, 88 S. Ct. 775, 19 L. Ed. 2d 827 (1968).

42. Remedies for conversion.

Although Article 9 of UCC contains no specific provision establishing cause of action against third party for conversion of property upon which another holds a security interest, that omission does not preclude or preempt another remedy; thus, in absence of facts creating waiver or release or showing acquiescence or consent on part of secured party to sale of property covered by security agreement, auctioneer who sold cattle subject to security interest was liable to secured party for conversion of cattle. *Hills Bank & Trust Co. v. Arnold Cattle Co.*, 22 Ill. App. 3d 138, 316 N.E.2d 669 (3d Dist. 1974).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the

cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

43. Remedies; foreclosure and sale.

In action on two promissory notes secured by debtor's interest in leases of two vending machines, UCC § 9-501(1) entitled creditor to collect note without first seeking recourse against collateral, particularly where creditor did first reasonably try to repossess machines; third promissory note secured by note payable to debtor which was itself secured by fourth deed of trust on realty was also recoverable under UCC § 9-102(3) without first requiring creditor to foreclose trust deed. *Bank of Cal. v. Leone*, 37 Cal. App. 3d 444 (1st Dist. 1974).

Article 9 of Uniform Commercial Code applies only to creation of security interest in personal property or fixture and is not applicable to creation of real estate mortgage; thus, provisions of Uniform Commercial Code were not bar to action to foreclose mortgage. *State Nat'l Bank v. Dick*, 164 Conn. 523, 325 A.2d 235 (1973).

F. Decisions Under Former Statutes.

44. In general.

The trust receipt laws are construed strongly against those retaining titles under them. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

The trust receipts act proceeds on the theory that the entruster is entitled to protection only against honest insolvency of the trustee, and dishonest action of the trustee is a credit risk and bona fide purchasers are to be protected against the entruster who has taken that risk by entrusting. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

III. Under former § 75-9-104.

45. In general.

Article 9 of Uniform Commercial Code does not apply to assignments made for collection purposes only. *W.C. Fore Trucking Co. v. Biloxi Prestress Concrete, Inc.*, 98 F.3d 204 (5th Cir. 1996).

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Uniform Commercial Code is totally inapplicable to nonpossessory liens and question of their priority in relation to secured interests must be determined by existing statutes and pre-code case law. *Leger Mill Co. v. Kleen-Leen, Inc.*, 563 P.2d 132 (Okla. 1977) (interests of secured creditors were prior to statutory "feedmen's" liens).

A detailed reading of this section indicates that all of the subsections deal with matters felt to be sufficiently covered by a statute of the United States or of the several states, or that they deal with special transactions which do not fit easily into the general commercial statute and which are adequately covered by existing law. *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965).

46. Security interest subject to federal statute: 9-104(a).

Article 9 of Uniform Commercial Code, which requires filing of financial statement to perfect security interest, applied to determination of whether unsecured debt assigned, for collection purposes only, to assignee holding secured debt arising from same transaction was secured, even though singular transaction of assignment for collection purposes was exempt from Article 9; transaction resulting in creation of security interest in debtor's inventory was transaction that was pivotal to court's decision as to whether there was perfected security interest in assigned debt. *W.C. Fore Trucking Co. v. Biloxi Prestress Concrete, Inc.*, 98 F.3d 204 (5th Cir. 1996).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at a public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

Exclusionary language of UCC § 9-104(a) applies only to extent that federal statute governs rights of parties to, and third parties affected by, transactions in particular types of property, and specifically leaves open possibility that Article 9 can be looked to for answer in event that federal statute contains no relevant provisions. *Haynes v. GECC*, 432 F. Supp. 763 (W.D. Va. 1977), aff'd, 582 F.2d 869 (4th Cir. Va. 1978) (stating that UCC had been adopted by both states, Pennsylvania and Virginia, that might be involved in case).

Ownership interest of buyer who bought airplane from recognized dealer in aircraft was superior to lien of defendant credit company which had loaned dealer money to purchase airplane, taken note for amount of such loan, executed security agreement whereby dealer pledged airplane and proceeds from its sale as security for payment of note, and recorded security agreement with aircraft registry office of Federal Aviation Administration pursuant to federal law (49 USCS

§ 1403), since (1) federal aircraft registration law, although providing that no interest in airplane could be valid in absence of federal recordation, was silent on issue of priorities among lien claimants and did not create affirmative priority of federally recorded interests as against rights declared by state law within meaning of UCC § 9-104(a); (2) defendant's security agreement, although recorded with federal aircraft registry office, also looked to Uniform Commercial Code as means by which defendant could enforce its rights; (3) buyer was purchaser in ordinary course of business from one engaged in selling goods of that kind, and sale was expressly permitted by defendant's security agreement; and (4) under UCC § 9-307(1), buyer in ordinary course of business clearly prevails over holder of security interest created by seller, even though such security interest is perfected. *Haynes v. GECC*, 432 F. Supp. 763 (W.D. Va. 1977), aff'd, 582 F.2d 869 (4th Cir. Va. 1978) (stating that UCC had been adopted by both states, Pennsylvania and Virginia, that might be involved in case).

Under UCC §§ 9-307(1) and 9-104(a), a security interest in an airplane held as part of a dealer inventory, which interest was duly recorded with the F.A.A. as required by federal law (see 49 USCS § 1403), is not superior to the rights of a purchaser for value from the dealer without actual notice of a security interest. In such case, although congress, by providing a federal system for registration of conveyances and liens affecting title to aircraft, did preempt that field and render state recording statutes inapplicable to such title instruments, the federal statute did not remove from resolution under state law questions concerning the validity of such title documents, actual notice, good-faith-purchaser status, and similar matters. *Bank of Hendersonville v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152 (Tenn. Ct. App. 1977), cert. denied, 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1972) (holding that rights of purchaser of airplane from dealer in ordinary course of business were superior to rights of holder of lien on moving stock of airplanes in dealer's possession).

Article 9 of UCC does not apply to statutory landlord's lien and, since land-

lord's statutory lien was not protected as security interest under UCC, it was not entitled to priority under § 6323(a) of Federal Tax Lien Act of 1966. On the other hand, contractual landlord's liens are not excused from filing requirement of UCC and, therefore, landlord's contractual lien must have been properly filed to have priority over government's tax lien. *United States (Treasury Dep't, IRS) v. Globe Corp.*, 113 Ariz. 44, 546 P.2d 11 (1976).

Transaction between local housing authority and United States whereby housing authority pursuant to its statutory powers granted to United States security interest prior to everyone else in world, including judgment creditor, was excluded from operative provisions of Uniform Commercial Code under § 9-104. *Union Nat'l Bank v. First Merrick Constr. Corp.*, 81 Misc. 2d 658 (1975).

Transactions relating to creation or perfection of security interests, rather than to assignments of receivables for collection, remain subject to provisions of Article 9 of Uniform Commercial Code, absent other controlling provisions. *W.C. Fore Trucking Co. v. Biloxi Prestress Concrete, Inc.*, 98 F.3d 204 (5th Cir. 1996).

47. Landlord's lien: 9-104(b).

Under former Maryland law controlling landlord's right to distrain goods for nonpayment of rent, the lien of a perfected security interest which was neither a conditional sales contract nor a purchase money mortgage was inferior to the landlord's lien upon property owned by and in the possession of the tenant, for the unqualified exclusion of landlord's liens from the UCC left the law with respect to them as it had been before. *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, 228 A.2d 463 (1967).

This section renders Code inapplicable to landlord's statutory lien. *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, 228 A.2d 463 (1967).

This section does not apply to a landlord's lien, and a landlord's right to distrain personal property for nonpayment of rent is governed by the Landlord and Tenant Act. *Firestone Tire & Rubber Co. v.*

Dutton, 205 Pa. Super. 4, 205 A.2d 656 (1964).

The Uniform Commercial Code does not apply to a landlord's lien. *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. Pa. 1959) (disapproved on other grounds *Jordan v Hamlett* (CA5 Ala) 312 F2d 121).

It seems highly questionable that a landlord's lien may come within § 9-310 as a lien for "services or materials" in the light of the distinction drawn between such liens and that of a landlord in this section, and the further fact that leasing of the premises does not enhance or preserve the value of the collateral situated thereon. *In re Einhorn Bros.*, 171 F. Supp. 655 (E.D. Pa. 1959), *aff'd*, 272 F.2d 434 (3d Cir. Pa. 1959) (disapproved on other grounds *Jordan v Hamlett* (CA5 Ala) 312 F2d 121).

48. —Not excluded; created by contract.

Since only statutory landlord's liens are excluded by UCC § 9-104(b) from operation of Article 9 of Uniform Commercial Code, prior contractual landlord's lien in personal property of debtor, which was expressly provided for in debtor's lease of certain realty but which landlord did not perfect as security interest by filing of proper financing statement under Article 9, was not superior to bank's subsequent security interest in same property which bank perfected by filing of proper financing statements. Moreover, bank in such case was not precluded from asserting under UCC § 9-312(5)(a) priority of its subsequently perfected security interest by fact that at time it extended credit to debtor and perfected security interest in debtor's property, it had actual knowledge of landlord's prior unrecorded contractual lien on such property, since it had notified landlord about loan it proposed to make to debtor and also had requested landlord to subrogate his interest to such loan, and landlord at that time could have perfected his contractual lien in debtor's property by filing proper financing statement covering such property. *Bank of N. Am. v. Kruger*, 551 S.W.2d 63 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (July 13, 1977).

Court agreed with referee in bankruptcy that Code § 9-104(b) referred to liens created by statute and not to a lien

created by contract. In re Leckie Freeburn Coal Co., 405 F.2d 1043, 6 U.C.C. Rep. Serv. 15 (6th Cir. Ky. 1969), cert. denied, 395 U.S. 960, 89 S. Ct. 2101, 23 L. Ed. 2d 746 (1969).

A "landlord's lien" as used in this section applies only to liens created by statute and it does not include liens created by contract. In re King Furn. City, Inc., 240 F. Supp. 453 (E.D. Ark. 1965).

A lien in favor of the landlord in a lease contract and stated to be in addition to the statutory lien is not excluded from the requirements of the Uniform Commercial Code. In re King Furn. City, Inc., 240 F. Supp. 453 (E.D. Ark. 1965).

49. —Priority over other liens.

Unless a landlord has expressly or impliedly waived the statutory landlord's lien, its rights are superior to all other interests, including those created by Chapter 9 of the Uniform Commercial Code. *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024 (Miss. 1990).

Since only statutory landlord's liens are excluded by UCC § 9-104(b) from operation of Article 9 of Uniform Commercial Code, prior contractual landlord's lien in personal property of debtor, which was expressly provided for in debtor's lease of certain realty but which landlord did not perfect as security interest by filing of proper financing statement under Article 9, was not superior to bank's subsequent security interest in same property which bank perfected by filing of proper financing statements. Moreover, bank in such case was not precluded from asserting under UCC § 9-312(5)(a) priority of its subsequently perfected security interest by fact that at time it extended credit to debtor and perfected security interest in debtor's property, it had actual knowledge of landlord's prior unrecorded contractual lien on such property, since it had notified landlord about loan it proposed to make to debtor and also had requested landlord to subrogate his interest to such loan, and landlord at that time could have perfected his contractual lien in debtor's property by filing proper financing statement covering such property. *Bank of N. Am. v. Kruger*, 551 S.W.2d 63 (Tex. Civ. App. 1977), writ ref'd n.r.e., (July 13, 1977).

Article 9 of UCC does not apply to statutory landlord's lien and, since landlord's statutory lien was not protected as security interest under UCC, it was not entitled to priority under § 6323(a) of Federal Tax Lien Act of 1966. On the other hand, contractual landlord's liens are not excused from filing requirement of UCC and, therefore, landlord's contractual lien must have been properly filed to have priority over government's tax lien. *United States (Treasury Dep't, IRS) v. Globe Corp.*, 113 Ariz. 44, 546 P.2d 11 (1976).

Where debtor and lender bank entered into a security agreement granting the bank a security interest in debtor's merchandise inventory which the bank perfected by filing, and thereafter the Commonwealth filed unemployment compensation claims against the debtor, thereby fixing liens upon all of debtor's real and personal property, and landlord levied a distraint for rent against the debtor's property, and the bank instituted an action of replevin with bond of debtor's goods subject to bank's security interest, and on same day debtor filed a petition for arrangement which was subsequently converted into bankruptcy proceeding, and bankruptcy court restrained execution of writ of replevin, the order of distribution would be (1) costs of administration, (2) wages, (3) liens of Commonwealth, (4) lien of landlord, and (5) bank's lien. *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. Pa. 1959).

Creditor's security interest in the bankrupt's merchandise inventories was inferior to landlord's lien since statute giving landlord a superior lien was left undisturbed by enactment of the Uniform Commercial Code. *In re Einhorn Bros.*, 171 F. Supp. 655 (E.D. Pa. 1959), aff'd, 272 F.2d 434 (3d Cir. Pa. 1959).

50. Statutory lien for services or materials: 9-104(c).

In action between bank which held prior federally recorded security interest in airplane and bailee which held possessory lien for storage charges, under UCC §§ 9-104(c) and 9-310, possessory lien had priority over bank's interest. *Industrial Nat'l Bank v. Butler Aviation Int'l, Inc.*, 370 F. Supp. 1012 (E.D.N.Y. 1974).

51. —Not excluded.

Where a statutory lien is available, as was the case here where seller had delivered electrical appliances which were ordered by general contractor and installed in apartment house, then a security interest is not available, and Article 9 of the Code does not apply, except as to priorities.

The transaction did not come within the exclusion provision of the instant section where a furniture dealer sold and delivered under what he described as a "conditional sales contract note" carpeting and furniture to a nonprofit corporation. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

52. Transfer of claim for wages, salary or other compensation: 9-104(d).

With respect to the assignability of wages of government employees, it has been pointed out that even the Code "which provides a high degree of assignability, specifically states that it does not apply '(d) to a transfer of a claim for wages, salary, or other compensation of an employee.'" *Opinion of the Justices*, 1961, 103 N.H. 381, 173 A.2d 578

53. —Not excluded.

In interpleader proceeding to establish priority of claims to money due and payable to debtor under general agency contract, UCC § 9-104 exemption from coverage of article 9 of claims for wages, salary, or other compensation of employee was inapplicable where debtor was independent contractor; creditor who had obtained perfected security interest in debtor's commissions had first priority against funds, while rights of creditor who had failed to perfect its security interest as required by UCC § 9-302 were subordinated to rights of those who qualified as lien creditors under UCC § 9-301; burden of proof as to whether lien creditors had knowledge of unperfected security interest rested on holder of unperfected security interest. *Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank*, 372 F. Supp. 1027 (E.D. Pa. 1974), *aff'd sub nom. In re Franklin Nat'l Bank*, 510 F.2d 969 (3d Cir. Pa. 1975), *aff'd*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom. In re Mer-*

cantile Financial Corp., 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom. In re Miller*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom. In re Mokrin*, 510 F.2d 970 (3d Cir. Pa. 1975).

54. Sale or assignment of accounts, contract rights, or chattel paper: 9-104(f).

Transaction between export-import company and sales corporation whereby export-import company undertook to perform contract between sales corporation and buyer of shoes to import and deliver shoes to buyer, was assignment of contract rights by sales corporation to export-import company within meaning of UCC § 9-104(f) and, thus, was not secured transaction with scope of Article 9. *American E. India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3d Cir. Pa. 1978).

Where (1) general contractor retained sum due under contract with subcontractor on ground that subcontractor's work was poorly performed, and (2) subcontractor then assigned such sum to creditor, to whom subcontractor owed preexisting debt, without general contractor's written consent, although such consent was required by contract between general contractor and subcontractor, court held that since assignment did not involve sale within the meaning of UCC § 2-102, prohibition against assignments in contract between general contractor and subcontractor was not rendered invalid by UCC Article 2 on sales or by any other provision of Uniform Commercial Code, including UCC § 9-104(f) which deals with inapplicability of Article 9 to assignment of accounts or contract rights for collection only. *Frazier v. National Elec. Supply Co.*, 362 So. 2d 609 (Miss. 1978), overruled on other grounds, *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056 (Miss. 1982).

"Letter of Assignment" sent by general contractor to bank, which (1) informed bank that specified sum due from general contractor to subcontractor under specified subcontract would be paid to subcontractor and (2) was given to bank to induce it to lend funds to subcontractor to complete its subcontract with general contractor, constituted independent contract be-

tween general contractor and bank and provided additional protection to bank for making such loan. Since such letter was an independent contract instead of a simple assignment, it was not subject to provisions of UCC Art 9 (see UCC § 9-104(f)). *American Bank of Commerce v. M & G Bldrs., Ltd.*, 92 N.M. 250, 586 P.2d 1079 (1978).

To have priority over federal tax lien, assignee of royalty rights in showing of movie should have protected interest by filing of financing statement, unless assignee could establish that assignment involved insignificant portion of contract rights within the meaning of UCC § 9-302(1)(e). *Consolidated Film Indus. v. United States*, 547 F.2d 533 (10th Cir. Utah 1977).

Exclusion from Article 9 coverage of sale of accounts, contract rights or chattel paper as part of "sale of the business out of which they arose" was inapplicable where evidence showed that debtor had been charged \$25 per month rent after debtor had assigned its accounts and moved to premises of assignee and went out of business shortly after assignment agreement. *Vittert Constr. & Inv. Co. v. Wall Covering Contractors*, 473 S.W.2d 799 (Mo. Ct. App. 1971).

55. —Not excluded.

Creditor could not avoid UCC filing requirements by arguing under UCC § 9-104(6) that transaction was "assignment ... for the purpose of collection only" where creditor did not run collection agency but was rather seeking to secure loan to debtor. *York v. Ottusch*, 412 F. Supp. 819 (W.D. Wis. 1976).

Cable television installation agreements used as collateral to secure payment of promissory notes due former limited partner were "general intangibles" under UCC § 9-102(1)(a), and were not affected by UCC § 9-104(f), exclusion of "contract rights" from perfecting of valid security interests, where none of rights under security transaction were for payment of money and it was not contested that parties intended to create security interests. *Dynair Elecs. Inc. v. Video Cable, Inc.*, 55 Cal. App. 3d 11 (4th Dist. 1976).

Exclusion of § 9-104(f) relates to assignments of non-commercial nature such as those to collection agency for sole purpose of facilitating collection of debt, and does not exclude present action to determine validity of assignments of accounts receivable made for a financing purpose. *Bramble Transp., Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97 (Del. Super. 1971), *aff'd*, 294 A.2d 104 (Del. 1972).

Assignee of debtor's accounts could not invoke exceptions to filing requirements of UCC § 9-104(f) since monthly rental charged to debtor and fact that he went out of business shortly after assignment negated concept of "sale of a business" and since, if assignment was for "purpose of collection only", then assignee had no beneficial interests higher than that of assignor who admittedly was indebted on the judgment and tax lien. *Vittert Constr. & Inv. Co. v. Wall Covering Contractors*, 473 S.W.2d 799 (Mo. Ct. App. 1971).

56. Transfer of interest in or claim under insurance policy: 9-104(g).

Secured lending bank could not recover proceeds of auto insurance policy upon destruction of collateral by fire where bank was not named as loss payee, and where, prior to 1977 revision of UCC, insurance claims were excluded under UCC § 9-104(g). *First Nat'l Bank v. Merchant's Mut. Ins. Co.*, 49 N.Y.2d 725, 402 N.E.2d 1168 (1980).

The claim which an insurance company has against the recovery which its insured may obtain, after having entered into a loan receipt transaction with him, is not such an interest as can be protected by filing under the Code. *Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc.*, 373 F.2d 701 (3d Cir. Pa. 1967), *cert. denied*, 389 U.S. 825, 88 S. Ct. 63, 19 L. Ed. 2d 79 (1967).

The adoption of the exclusion set forth in subdiv. (g) indicates a legislative recognition that the right to insurance moneys is a matter of contract and does not run with the goods. *Universal C.I.T. Credit Corp. v. Prudential Inv. Corp.*, 101 R.I. 287, 222 A.2d 571 (1966).

57. —Not excluded.

Insurance payments made because of casualty loss of collateral are "proceeds"

pursuant to provision of UCC § 9-306(1), effective July, 1978, which includes "insurance payable by reason of loss or damage to collateral except to extent it is payable to a person other than a party to the security agreement"; where automobile accident occurred in 1975, the above language of UCC § 9-306(1) is not relevant, and UCC § 9-104(g) which states that UCC Art 9 does not apply to a transfer of an interest or claim in or under any insurance policy is applicable. *First Nat'l Bank v. Merchant's Mut. Ins. Co.*, 49 N.Y.2d 725, 402 N.E.2d 1168 (1980).

Under security agreement granting creditor security interest in inventory and equipment and further providing that debtor would maintain insurance policy on collateral with creditor as payee, and providing that security interest was to continue in proceeds from inventory, creditor had valid security interest in proceeds of fire insurance policy upon destruction of inventory under UCC § 9-306(1), where party's clear intention was to give secured party benefit of insurance proceeds; UCC § 9-104(g), providing that Article Nine does not apply "to a transfer of an interest or claim in or under any policy of insurance" is applicable only in situations where parties to security agreement attempt to create direct security interest in insurance policy by making policy itself immediate collateral securing transaction, and not to situations where security agreement creates both direct security interest in inventory and/or equipment and requires debtor to provide his creditor with further protection by insuring collateral. *PPG Indus., Inc. v. Hartford Fire Ins. Co.*, 531 F.2d 58 (2d Cir. N.Y. 1976).

58. Right represented by judgment: 9-104(h).

UCC § 9-104(j) provides that UCC Art 9 does not apply to creation or transfer of interest in real estate, including lease or rents thereunder. Thus, in action by assignee of right to receive royalties and rent payments arising from lease of rock quarry against judgment lien creditors of assignor of such right and garnishees in possession of such rents and royalties, rents and royalties in garnishees' possession were not subject to UCC Art 9, and

judgment lien creditors were not prohibited by UCC § 9-301 from taking priority to such funds over assignee who had unperfected security interest in funds, even though judgment lien creditors had knowledge of assignee's security interest at time they became lien creditors. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 552 S.W.2d 392 (Tenn. Ct. App. 1976).

Filing was not necessary to perfect assignment of judgment under UCC since § 9-104(h) specifically excludes right represented by judgment from Article 9 of UCC. *Law Research Serv., Inc. v. Martin Lutz Appellate Printers, Inc.*, 498 F.2d 836 (2d Cir. N.Y. 1974).

59. Right of set-off: 9-104(i).

UCC § 9-104(i), which provides that Article 9 does not apply to any right of setoff, does not mean that a general creditor can abrogate a perfected security interest simply by having a right to, and an opportunity for, a setoff. All that UCC § 9-104(i) means is that a right of setoff may exist in a creditor who does not have a security interest. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

While the language of UCC § 9-104(i), providing that UCC Article 9 does not apply to any right of setoff, is plain enough, the conclusion that this section removes from the operation of the Uniform Commercial Code any controversy between a setting-off bank and a secured party is not warranted by the narrow purpose that this section is intended to serve. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

UCC § 9-104(1) cannot mean that general creditor may abrogate perfected security interest by simply having a right to and opportunity for a set-off; all this section means is that a right of set-off may exist in a creditor who does not have a security interest. *Associates Disct. Corp. v. Fidelity Union Trust Co.*, 111 N.J. Super. 353, 268 A.2d 330 (L. Div. 1970).

60. Transfer of interest in or lien upon real estate; mortgages: 9-104(j).

In creditor's action against trustees of dissolved corporation to foreclose mort-

gage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Assignment of a real estate mortgage, which secures a promissory note that is included in such assignment, as collateral for a bank loan is not a secured transaction under UCC Art 9 because it is specifically excluded by UCC § 9-104(j). *Rucker v. State Exch. Bank*, 355 So. 2d 171 (Fla. App. 1978).

Mortgage or assignment of oil and gas leasehold for security purposes was treated as real estate mortgage and therefore outside scope of Article 9 of Uniform Commercial Code. *Ingram v. Ingram*, 214 Kan. 415, 521 P.2d 254 (1974).

Real estate mortgages are not to be viewed as security agreements merely because they happen to contain provisions relating to attached personalty. In *re Royer's Bakery, Inc.*, 58 Lanc. L. Rev. 405 (Pa 1963).

61. Transfer of interest in or lien upon real estate; leases and rents: 9-104(j).

Although the district court's application of the Uniform Commercial Code was correct with respect to issues pertaining to the Small Business Administration's auction of chattel pursuant to the guaranty agreement between the SBA and appellants, which provided that the SBA may sell the secured property on default subject only that "such powers to be exercised only to the extent permitted by law", Mississippi real property law, § 89-1-55, governed the propriety of the sale of borrower's leasehold, rather than § 75-9-104(j), which specifically excludes from coverage transfers of real property, including leaseholds. *United States v. Irby*, 618 F.2d 352 (5th Cir. 1980).

UCC § 9-104(j) provides that UCC Art 9 does not apply to creation or transfer of interest in real estate, including lease or rents thereunder. Thus, in action by assignee of right to receive royalties and rent payments arising from lease of rock quarry against judgment lien creditors of assignor of such right and garnishees in possession of such rents and royalties, rents and royalties in garnishees' possession were not subject to UCC Art 9, and judgment lien creditors were not prohibited by UCC § 9-301 from taking priority to such funds over assignee who had unperfected security interest in funds, even though judgment lien creditors had knowledge of assignee's security interest at time they became lien creditors. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 552 S.W.2d 392 (Tenn. Ct. App. 1976).

Lender who took security interest in lessor-borrower's lease and in rents thereunder as security for loan did not have to comply with filing provisions of Article 9 to perfect its interest against attack by receiver in bankruptcy; drafters who wrote Article 9 and legislators who enacted it into law intended § 9-104(j) to be interpreted sufficiently broadly to exclude assignment of lease and rents thereunder from operation of Article 9. In *re Bristol Assocs.*, 505 F.2d 1056 (3d Cir. Pa. 1974).

Article 9 of UCC does not apply to real estate lease or rents thereunder.

Marcelletti & Son Constr. Co. v. Millcreek Tp. Sewer Auth., 313 F. Supp. 920 (W.D. Pa. 1970).

62. —Not excluded.

UCC § 9-104(j), excluding from operation of Article 9 “the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder,” did not apply to assignment of accounts receivable of motel or hotel business to secure payments due under lease; hence, mere fact that lease and lease amendment, which assigned to lessor in event of default rents, issues, income and profits arising from operation of motel, were recorded as instruments affecting real estate did not affect priority of secured party’s security interest in accounts receivable. *United States v. PS Hotel Corp.*, 404 F. Supp. 1188 (E.D. Mo. 1975), *aff’d*, 527 F.2d 500 (8th Cir. Mo. 1975).

63. Transfer of interest in deposit account or tort claim: 9-104(k).

The fact that UCC § 9-104(k) prevents the creation of a security interest in a bank deposit account does not affect the validity of an assignment of the account for other purposes. *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Assignment of passbook savings account was governed by common law rather than Uniform Commercial Code, inasmuch as UCC § 9-104(1) specifically exempts transfer of interest in deposit account from its coverage and under UCC § 9-105(1)(e), deposit account includes passbook. *Iser Elec. Co. v. Ingran Constr. Co.*, 48 Ill. App. 3d 110, 362 N.E.2d 771 (2d Dist. 1977).

Missouri courts would not permit defendant bank to retain amount debited outside usual course of business and thereby defeat security interest of plaintiff in identifiable proceeds of sale of 6 automobiles, where evidence indicated that debtor asked bank to debit his account for amount owed to bank and refused to write bank check for amount indicating that he wished to keep plaintiff from collecting on previously issued checks, and debiting transaction transpired after close of bank’s business. *Universal C.I.T. Credit*

Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973).

Common-law pledge is given recognition by UCC § 9-104 with respect to any deposit, savings, passbook or like account maintained with bank, savings and loan association, credit union or like organization, and lien of pledgee is perfected by delivery of such intangibles by pledgor to pledgee. *Walton v. Piqua State Bank*, 204 Kan. 741, 466 P.2d 316 (1970).

64. —Not excluded; certificates of deposit.

Where (1) debtor at time it borrowed \$250,000 from bank purchased \$13,000 certificate of deposit which was nonnegotiable and nonassignable unless assignment was consented to and recorded on bank’s books, (2) bank’s customer contract with debtor authorized it to apply debtor’s account, whether savings or certificate of deposit, to any indebtedness due bank from debtor, (3) debtor without bank’s consent or knowledge assigned certificate to indemnity company to provide collateral for bond that debtor purchased from such company, (4) indemnity company thereafter sent certificate to bank with request for payment, and (5) bank, which had not changed its position in reliance on such certificate, thereupon set off funds represented by certificate against debt owed by debtor and demanded that balance of debt be paid, federal court in absence of clearly controlling precedents in decisions of Florida Supreme Court would certify following questions to such court: (1) Was assignment of certificate of deposit as security for purpose of bond a transfer that was entitled to secured-transaction treatment under Florida UCC Art 9? (2) Was such transaction excluded from coverage under Florida UCC Art 9 by Florida UCC § 9-104(9) (Official UCC § 9-104(i)) or Florida UCC § 9-104(11) (Official UCC § 9-104(k))? (3) Did Florida UCC § 9-318(4) (Official UCC § 9-318(4)) invalidate prohibition against assignment of certificate without bank’s consent and notation of assignment on bank’s books? (4) Was bank’s asserted right of setoff established by Florida UCC § 9-318(1) (Official UCC § 9-318(1))? *Bornstein v. Citizens Nat’l Bank*, 564 F.2d 721 (5th Cir. Fla. 1977).

Certificates of deposit are instruments in which a security interest may be perfected and are not excluded from coverage under Article 9 by UCC § 9-104 which provides that Article 9 does not apply to transfer of "any deposit." *Southview Corp. v. Kleberg First Nat'l Bank*, 512 S.W.2d 817 (Tex. Civ. App. 1974).

65. Miscellaneous transactions.

This section, excluding transactions from coverage when governmental agency is debtor or borrower, does not apply when governmental agency is secured creditor.

Peoples Bank & Trust Co. v. Applewhite (In re 20th Century Enters., Inc.), 152 B.R. 119 (Bankr. N.D. Miss. 1992).

Surety claiming under terms of performance bond application was not entitled to equitable lien upon proceeds from sale of contractor's personal property, and did not have contract right but only security interest which it was required to file and perfect. *Aetna Cas. & Sur. Co. v. J.F. Brunken & Son*, 357 F. Supp. 290 (D.S.D. 1973).

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts. 10 A.L.R.2d 447.

Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance. 15 A.L.R.2d 883.

Bill of sale, absolute on its face, as a chattel mortgage. 33 A.L.R.2d 364.

Lease of realty for term of years as subject of chattel mortgage. 33 A.L.R.2d 1277.

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage. 34 A.L.R.2d 902.

Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property. 68 A.L.R.2d 1259.

Validity of chattel mortgage on stock of goods which mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attack. 71 A.L.R.2d 1416.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like. 72 A.L.R.2d 342.

Priority as between seller or conditional seller of personalty and claimant under after-acquired property clause of mortgage or other instrument. 86 A.L.R.2d 1152.

Secured transactions: priority as between statutory landlord's lien and secu-

rity interest perfected in accordance with Uniform Commercial Code. 99 A.L.R.3d 1006.

Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff. 3 A.L.R.4th 998.

Security interests in liquor licenses. 56 A.L.R.4th 1131.

Applicability of Article 9 of Uniform Commercial Code to assignment of rights under real-estate sales contract, lease agreement, or mortgage as collateral for separate transaction. 76 A.L.R.4th 765.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 10 et seq., 34.

6 Am. Jur. 2d, Attachment and Garnishment § 144.

15A Am. Jur. 2d, Commercial Code § 11.

68A Am. Jur. 2d, Secured Transactions §§ 8, 9, 106, 123 et seq., 129 et seq.

Applicability; excluded transactions, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:11, 9:21-9:37.

5A Am. Jur. Pl & Pr Forms (Rev), Chattel Mortgages, Forms 1 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:1 et seq. (applicability).

Excluded transactions, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:2931, 253:2932.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi, 53 Miss. L. J. 551, December, 1983.

1983 Mississippi Supreme Court Review; Article 9 priority provisions and right of set-off. 54 Miss. L. J. 105, March, 1984.

Harvey, Article 9's Exclusion of Consensual Landlord's Liens: King Furniture City Revisited. 16 UCC L. J. 360, Spring, 1984.

§ 75-9-110. Security interests arising under Article 2 or 2A.

A security interest arising under Section 75-2-401, 75-2-505, 75-2-711(3), or 75-2A-508(5) is subject to this article. However, until the debtor obtains possession of the goods:

- (1) The security interest is enforceable, even if Section 75-9-203(b)(3) has not been satisfied;
- (2) Filing is not required to perfect the security interest;
- (3) The rights of the secured party after default by the debtor are governed by Article 2 or 2A; and
- (4) The security interest has priority over a conflicting security interest created by the debtor.

SOURCES: Former 1972 Code § 75-9-110 [Codes, 1942, § 41A:9-110; Laws, 1966, ch. 316, § 9-110] is now found in comparable provisions enacted at § 75-9-108 by Laws, 2001, ch. 495, § 1. Present § 75-9-110 derived from former 1972 Code § 75-9-113 [Codes, 1942, § 41A:9-113; Laws, 1966, ch. 316, § 9-113; Laws, 1994, ch. 445, § 4] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Motor vehicle sales finance law, see §§ 63-19-1 et seq. Reservation on security on passing of title to goods, see § 75-2-401.

Identification whereby buyer obtains special property and insurable interest in goods, see § 75-2-501.

Seller's shipment under reservation, see § 75-2-505.

Rights of financing agency on sale of goods, see § 75-2-506.

Seller's rights and remedies, see §§ 75-2-702 et seq.

Seller's stoppage of delivery in transit or otherwise, see § 75-2-705.

Seller's resale including contract for resale, see § 75-2-706.

"Person in the position of a seller", see § 75-2-707.

Buyer's security interest in rejected goods, see § 75-2-711.

Collecting bank's security interest, see § 75-4-208.

Scope of this chapter, see § 75-9-109.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-113.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-113.

6. In general.

Where (1) five shipments of nylon yarn shipped from the Netherlands were deliv-

ered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the

contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should

have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978).

Retention of title to fork lift gave seller no right as against secured party with perfected security interest in fork lift where debtor had possession of fork lift; under UCC § 1-201(37) retention of title by seller was limited in effect to reservation of security interest and under UCC § 9-113 such security interest was subject to provisions of Article 9, except to extent that debtor did not have possession of goods, but, since debtor did acquire possession, seller would have been required to execute written security agreement to render its security interest enforceable even as against debtor under UCC § 90203. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

RESEARCH REFERENCES

ALR. Bill of sale, absolute on its face, as a chattel mortgage. 33 A.L.R.2d 364.	Transactions, Form 9:184 (lien of attaching creditor of goods in buyer's possession superior to lien of seller where security interest not perfected).
Am Jur. 68A Am. Jur. 2d, Secured Transactions § 149.	
6 Am. Jur. Pl & Pr Forms (Rev), Secured	

PART 2.

EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT.

Subpart 1.	Effectiveness and Attachment.....	75-9-201
Subpart 2.	Rights and Duties.....	75-9-207

Editor's Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under "Judicial Decisions" were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

SUBPART 1.

EFFECTIVENESS AND ATTACHMENT.

SEC.

- 75-9-201. General effectiveness of security agreement.
75-9-202. Title to collateral immaterial.
75-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.
75-9-204. After-acquired property; future advances.
75-9-205. Use or disposition of collateral permissible.
75-9-206. Security interest arising in purchase or delivery of financial asset.

§ 75-9-201. General effectiveness of security agreement.

(a) Except as otherwise provided in the Uniform Commercial Code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and to Sections 75-67-101 through 75-67-135, Sections 75-67-201 through 75-67-243, Sections 75-67-1 through 75-67-39, Sections 63-19-1 through 63-19-55 and to any other statute or regulation of this state that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit, and to any consumer-protection statute or regulation of this state.

(c) In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b), the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) has only the effect the statute or regulation specifies.

(d) This article does not:

(1) Validate any rate, charge, agreement, or practice that violates a rule of law, statute or regulation described in subsection (b); or

(2) Extend the application of the rule of law, statute or regulation to a transaction not otherwise subject to it.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Security interests under motor vehicle titles law, see §§ 63-21-1 et seq.

Variance of provisions of this Code by agreement, see § 75-1-102(3).

Statute of frauds, generally, see § 75-1-206.

Protection of buyers of goods, see § 75-9-307.

Priorities as to conflicting security interests, see § 75-9-312.

Interest and usury, see §§ 75-17-1 et seq.

Personal property loans, see §§ 75-67-1 et seq.

Small loan regulations, see §§ 75-67-101 et seq.

Small loan privilege tax, see §§ 75-67-201 et seq.

Payment extinguishing mortgage, see § 89-1-49.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-201.

6. In general.
7. Security devices.
8. Construction with other laws.
9. —Title acts.
10. After-acquired property.
11. Priority.
12. —Creditors.
13. —Tax liens.
14. Defective security interests.
15. —Failure to perfect.

III. Under former § 75-9-203(4).

16. In general.
17. Construction with other laws.
18. —With other sections.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-201.

6. In general.

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to sat-

isfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion—the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Under UCC, parties to security agreement were free to decide who should have right to possession of collateral. *American Honda Motor Co. v. United States*, 363 F. Supp. 988 (S.D.N.Y. 1973).

7. Security devices.

Lease of restaurant equipment did not constitute security agreement and, hence, guarantors of lessee's performance of terms of lease were not entitled to notice required by UCC § 9-504(3) where leased equipment was sold at private sale after lessee failed to pay rent and after demand for payment from guarantors had been ignored. *Diaz v. Goodwin Bros. Leasing, Inc.*, 511 S.W.2d 680 (Ky. 1974).

A conditional sales contract is a valid security agreement and creates a security interest analogous to that of a chattel mortgage, and where it is executed prior to the date when assessment, notice, and demand were made upon the conditional purchaser for payment of federal taxes, the interest of a conditional vendor takes priority over the tax assessment, and as between the vendor and the United States it is immaterial that the sales contract was not recorded until a date subsequent to the tax assessment and demand. *United States v. Lebanon Woolen Mills Corp.*, 241 F. Supp. 393 (D.N.H. 1964).

8. Construction with other laws.

The Arkansas Usury Law governed the enforceability of a conditional sales contract executed in Arkansas in connection with a purchase made in that state and providing that payments under the contract were to be made at the seller's Arkansas office, and the law of Tennessee under which the contract would not have been usurious did not govern in the absence of an agreement between the parties to that effect, even though the contract was assigned to a Tennessee bank and that at the time the transaction was entered into the vendee was also a Tennessee resident. *Lyles v. Union Planters Nat'l Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965).

The fact that Uniform Commercial Code was enacted subsequent to the Motor Vehicle Sales Finance Act of 1947 (69 Purdon's Pennsylvania Statutes §§ 601 et seq.), and there is a general repealing

clause in the Code, is not necessarily conclusive on the issue of legislative intent, and, in view of § 9-201, providing that nothing in the article validates any charge or practice illegal under any rule of law or regulation governing instalment sales, and § 9-203, providing that transaction although subject to the article, must also comply with the Motor Vehicle Sales Finance Act, the legislature did not intend to repeal the earlier law. *First Nat'l Bank v. Horwatt*, 192 Pa. Super. 581, 162 A.2d 60 (1960).

9. —Title acts.

As between the parties, the fact that the creditors' interest is not noted on the title certificate is immaterial since as between the creditor and the debtor the creditor's security interest attaches immediately upon the execution of a written agreement that there be such an interest, which agreement describes the collateral, bears the debtor's signature, and does not include any provision expressly postponing the attaching of the security interest. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

The security interest of a seller under an installment contract for the sale of a truck was perfected by a notation of the encumbrance on the certificate of title to the truck, pursuant to statute, and the perfected security interest was effective against the insolvent buyer's receivers in equity. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

10. After-acquired property.

Provision in two security agreements, executed to secure payment of two notes evidencing loans made by bank to debtor, that collateral secured all existing and subsequently incurred indebtedness of debtor to bank was valid and effective under UCC § 9-201 and § 9-204(5) to continue bank's lien on collateral, even after debtor paid the two notes, where debtor had incurred other indebtedness to bank which remained unpaid. *National Bank v. Shaad*, 60 A.D.2d 774 (4th Dep't 1977).

Where a security agreement gave the lender a security interest in the borrower's inventory, including all raw materials,

work in progress, finished goods, and all similar goods thereafter acquired, including their product and proceeds, the lender's security interest attached not only to raw materials sold to the borrower by a supplier who failed to retain and perfect a purchase-money security interest therein, but the lender's interest also attached to the borrower's finished products which supplier had received in payment; and the lender's rights could not be defeated by application of the equitable doctrine of unjust enrichment. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

11. Priority.

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to fur-

nish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right to set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion—the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Since the effect of UCC § 9-201 is to give the secured party, on the debtor's default, priority over "anyone, anywhere, anyhow," except as otherwise provided by the remaining code priority rules, and since there is no specific priority rule that deals with the conflict between the holder of a security interest in proceeds from the disposition of the debtor's collateral and a bank's setoff right against funds in the debtor's bank account which represent such proceeds, the bank's claim of setoff, where the bank is an unsecured general creditor, is subordinated to the secured

party's security interest. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

Insurance company which, as part of claim settlement, obtained title to car covered by security interest, was liable to secured party for unpaid balance under UCC § 9-201, even though car was total loss and had no value; insurance company was not buyer of automobiles in ordinary course of business under UCC § 9-307. *GMAC v. Allstate Ins. Co.*, 77 Misc. 2d 849 (1974).

12. —Creditors.

UCC § 9-201 gives the holder of even an unperfected security interest priority over the general creditors of the debtor as to the property secured. *Intertherm, Inc. v. Olympic Homes Sys.*, 569 S.W.2d 467 (Tenn. Ct. App. 1978).

Contractor had rights in funds retained by city under construction contract, notwithstanding contract conditioned payment of retainage upon contractor's first paying all subcontractors and materialmen and contractor had not made all such payments; thus bank's security agreements were sufficient to give it security interest in retained funds, which had been assigned to bank, superior to that of general creditors. *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501 (Tex. 1975).

In dispute over funds in segregated bank account into which bankrupt debtor deposited cash proceeds from after acquired inventory accounts receivable, contract rights, and general intangibles relating to production and sale of microwave ovens, secured creditor prevailed over judgment creditor where security agreement was effective between parties and against creditors under UCC § 9-201 and moneys in account constituted identifiable noncommingled cash proceeds under UCC § 9-306(4). *Salzer v. Victor Lynn Corp.*, 114 N.H. 29, 315 A.2d 185 (1974).

13. —Tax liens.

Where subcontractor assigned its right to payment under contract with contractor, where right to payment was in existence at time of assignment by virtue of

subcontractor's performance under contract, and where assignee's right to receive payment under contract could not be disrupted under state law by lien of judgment against subcontractor, assignee's interest was perfected under federal law prior to recording of government's tax liens and, therefore, had priority over those liens with respect to fund in question, notwithstanding assignee did not file its assignment as required by UCC. *Major Elec. Supplies, Inc. v. J.W. Pettit Co.*, 427 F. Supp. 752 (M.D. Fla. 1977).

An earlier perfected chattel mortgage lien upon property not owned by the chattel mortgage debtor but owned by the taxpayer who had represented to the creditor that the debtor owned the property has priority over a perfected tax lien of the government. *Avco Delta Corp. Canada v. United States*, 459 F.2d 436 (7th Cir. Ill. 1972).

A purchase money security interest in the assets and a state liquor license of a tavern, when perfected, has priority over a subsequent tax lien of the United States. *Paramount Fin. Co. v. United States*, 13 Ohio Misc. 195, 379 F.2d 543 (6th Cir. Ohio 1967).

14. Defective security interests.

Secured party did not have security interest in inventory located at debtor's retail furniture business where security agreement signed by debtor granted security interest in "all machinery, equipment and inventory maintained in the conduct of the debtor's business..." where debtor maintained two businesses, a furniture manufacturing business and a retail furniture store, where retail furniture business was not mentioned in security agreement and where debtor testified that inventory at retail store was not intended to be included in security agreement. In re *Metzler*, 405 F. Supp. 622 (N.D. Ala. 1975).

Financing statement between wholesaler and retailer describing collateral but containing no indication of obligation for which collateral was security could not be considered "security agreement" and did not elevate wholesaler to status of preferred creditor. *Needle v. Lasco Indus., Inc.*, 10 Cal. App. 3d 1105 (2d Dist. 1970).

15. —Failure to perfect.

Fact that security interest in citrus packing equipment was never perfected did not preclude enforcement against defaulting buyer. *DeVita Fruit Co. v. FCA Leasing Corp.*, 71 Ohio Op. 2d 525, 473 F.2d 585 (6th Cir. Ohio 1973).

Lack of perfection of security interest under Article 9 of UCC relates only to priority over other creditors' interests in collateral, and security agreement as between parties themselves and secured party's rights over collateral as against debtor are unaffected by failure to perfect security interest; thus, assignee for security purposes of beneficial interest in land trust was entitled to redeem from tax sale of real estate which comprised corpus of trust notwithstanding his failure to perfect security interest by filing financing statement. *Application of County Treasurer of Du Page County* (App. 2 Dist. 1973) 16 Ill.App. 3d 385, 306 N.E.2d 743

III. Under former § 75-9-203(4).**16. In general.**

The conditions for a valid and enforceable security agreement under the Uniform Commercial Code are: (1) a written agreement signed by the debtor granting a security interest in collateral; (2) a description of the collateral; (3) value given by the secured party; and (4) debtor's rights in the collateral. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

17. Construction with other laws.

The fact that Uniform Commercial Code was enacted subsequent to the Motor Vehicle Sales Finance Act of 1947 (69 Purdon's Pennsylvania Statutes §§ 601 et seq.), and there is a general repealing clause in the Code, is not necessarily conclusive on the issue of legislative intent, and, in view of § 9-201, providing that nothing in the article validates any charge or practice illegal under any rule of law or regulation governing installment sales, and § 9-203, providing that transaction although subject to the article must also

comply with the Motor Vehicle Sales Finance Act, the legislature did not intend to repeal the earlier law. *First Nat'l Bank v. Horwatt*, 192 Pa. Super. 581, 162 A.2d 60 (1960).

18. —With other sections.

Where two certificates of deposit were indorsed in blank by owners and delivered to bank to enable third party to obtain line of credit from bank; where in connection with delivery of certificates, owners thereof also simultaneously executed two instruments entitled "Consent to Pledge" and "Security Agreement-Pledge" which specifically described collateral (the two certificates of deposit) for proposed extension of credit by bank; and where bank in reliance on such instruments and delivery of the collateral advanced desired line of credit to third party, effect of transaction under UCC § 9-304(1) and § 9-305 was to create and perfect valid security interest in certificates in favor of bank which was enforceable under UCC § 9-203(1). *Montavon v. Alamo Nat'l Bank*, 554 S.W.2d 787 (Tex. Civ. App. 1977).

Provision of motor vehicle retail installment sales act requiring, under certain circumstances, election between alternative remedies was in conflict with cumulative remedies provided in UCC § 9-503 and 9-504, and therefore, pursuant to UCC § 9-203(4), which provides that where there is any conflict between provisions of Article 9 of Uniform Commercial Code and provisions of motor vehicle retail installment sales act, provisions of latter statute shall apply, creditor with security interest in automobile was limited to election required by such statute where conditions precedent to applicability of statute had been met. *Chicago City Bank & Trust Co. v. Anderson*, 26 Ill. App. 3d 421, 325 N.E.2d 701 (1st Dist. 1975).

This section of the Illinois UCC deviates from the model Uniform Act in that it provides that a transaction, although subject to the UCC is also subject to the Retail Installment Sales Act of that state. *First Nat'l Bank v. Husted*, 57 Ill. App. 2d 227, 205 N.E.2d 780 (2d Dist. 1965).

RESEARCH REFERENCES

ALR. Transfers or assignments within Federal anti-assignment statutes. 12 A.L.R.2d 460.

Rights of seller of motor vehicle with respect to purchase price or security on failure to comply with law governing transfer of title. 58 A.L.R.2d 1351.

Validity and construction of provision imposing "late charge" or similar exaction for delay in making periodic payments on note, mortgage, or instalment sale contract. 63 A.L.R.3d 50.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1). 73 A.L.R.3d 338.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 155 et seq.

78 Am. Jur. 2d, Warehouses §§ 86 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:9 (instruction to

jury; transaction subject to other regulatory statutes).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:344 (priorities; over unperfected interest; assignment for payment of debt as not a security transaction).

6 Am. Jur. Pl & Pr Forms (Rev ed), Secured Transactions, Forms 9:152-9:155 (validity of agreement).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3051 et seq. (general validity of security agreement; enforceability of security interest).

CJS. 79 C.J.S., Secured Transactions § 17 et seq.

93 C.J.S., Warehousemen and Safe Depositories §§ 50-55.

Law Reviews. 1983 Mississippi Supreme Court Review: Article 9 priority provisions and right of set-off. 54 Miss. L. J. 105, March, 1984.

§ 75-9-202. Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Passing of title, see § 75-2-401.

Effect of seller's tender; delivery on condition, see § 75-2-507.

Scope of Article, see § 75-9-109.

Possessory lien, see § 75-9-333.

Ineffective restrictions, see § 75-9-408, § 75-9-409.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-202.

6. In general.
7. After-acquired property.
8. Determination of title.
9. Locus of title.
10. Miscellaneous.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-202.

6. In general.

Under UCC §§ 9-203(1) and 9-204(1), there are four basic requirements to the creation of a valid security interest: (1) a security agreement must be entered into, (2) the agreement must be in writing or

the creditor must be in possession of the collateral, (3) the debtor must have rights in the collateral, and (4) the secured party must give value. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

The steps that must be taken as a prerequisite to the creation of a security interest that is enforceable against the debtor are stated in UCC §§ 9-203(1)(a) and (b) and 9-204(1) and may be summarized as follows: (1) the parties must enter into a security agreement; (2) they must reduce as much of that agreement to writing as is necessary to satisfy UCC § 9-203(1)(b), which also requires that the debtor sign such writing, or else possession of the collateral must be given to the creditor; (3) the debtor must acquire rights in the collateral; and (4) the secured party must give value. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Where security interest is involved, title is immaterial. *Harney v. Spellman*, 113 Ill. App. 2d 463, 251 N.E.2d 265 (4th Dist. 1969).

Each provision of this Article with regard to rights, remedies, and obligations in connection with secured transactions applies whether title to collateral is in the secured party or in the debtor. *McDonald v. Peoples Auto. Loan & Fin. Corp. of Athens, Inc.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967).

7. After-acquired property.

The rights of a creditor in after-acquired property under a security agreement, conferred by § 9-204(3) of the instant chapter, are not affected, by virtue of § 9-202, by the fact, in and of itself, that the after-acquired property is delivered to the debtor under a conditional sales agreement by which title is retained by the seller. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

8. Determination of title.

Devices whereby title is reserved in the seller-creditor for a period of time following possession by the debtor are treated under UCC Article 9 as though title had been transferred to the debtor and the seller-creditor had retained only a security interest in the goods. *O'Dell v. Kunkel's, Inc.*, 581 P.2d 878 (Okla. 1978).

Creation of security interest does not automatically vest title in secured party; rather, UCC leaves determination of who has title to parties to security agreement. *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154 (7th Cir. Ill. 1976).

9. Locus of title.

Under UCC §§ 9-203(1) and 9-204(1), there are four basic requirements to the creation of a valid security interest: (1) a security agreement must be entered into, (2) the agreement must be in writing or the creditor must be in possession of the collateral, (3) the debtor must have rights in the collateral, and (4) the secured party must give value. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

The steps that must be taken as a prerequisite to the creation of a security interest that is enforceable against the debtor are stated in UCC §§ 9-203(1)(a) and (b) and 9-204(1) and may be summarized as follows: (1) the parties must enter into a security agreement; (2) they must reduce as much of that agreement to writing as is necessary to satisfy UCC § 9-203(1)(b), which also requires that the debtor sign such writing, or else possession of the collateral must be given to the creditor; (3) the debtor must acquire rights in the collateral; and (4) the secured party must give value. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Since the draftsmen of the UCC intended that its provisions should not be circumvented by manipulation of the locus of title, consignment sales, conditional sales, and other arrangements or devices whereby title is retained in the seller for a period following possession by the debtor are all treated under Article 9 as though title had been transferred to the debtor and the creditor-seller had retained only a security interest in the goods. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

In order to meet the needs of the modern credit world, the Code ignores the question of the location of title. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

The Code simplifies the prior law by making immaterial the location of title as between creditor and the debtor. Anderson

v. First Jacksonville Bank, 243 Ark. 977, 423 S.W.2d 273 (1968).

In determining priorities it is immaterial whether title to collateral is in the secured party or the debtor. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

Since the UCC has abolished the technical distinctions between the various security devices, the federal bankruptcy courts should no longer feel compelled to engage in the purely theoretical exercise of locating "title;" nor should considerations of where "title lies" influence the courts in the exercise of their equitable discretion in ruling upon a security holder's petition for reclamation of collateral. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

10. Miscellaneous.

Under UCC § 9-202, legal title to equipment of corporation, if not immaterial, was not decisive as to extent to which equipment could be carried as asset on corporation's balance sheet, even when transaction was cast in terms of lease-purchase option agreement, and in light of UCC § 9-504(2), such equipment represented net asset to extent that its value

exceeded any indebtedness secured by it. *Ellzey v. Fyr-Pruf, Inc.*, 376 So. 2d 1328 (Miss. 1979).

Judgment creditor's assignee brought replevin action against debtor's transferee; assignee had paper title to bowling alleys in question; transferee actually possessed equity in alleys, subject to assignee's security interest; held, debtor's rights were not cut off merely as a result of debtor's failure to make payments and default judgment against him. *Brandywine Lanes, Inc. v. Pittsburgh Nat'l Bank*, 437 Pa. 499, 264 A.2d 377 (1970).

While the Code provides for the retention of a Motor Vehicle Act requiring the notation on the title certificate of liens of creditors, the Code and such an Act are to be read together, with the consequence that where the notation provision of the Motor Vehicle Act is specified in order to make the lien valid against creditors, it will not have any effect on the security interest as between the creditor and the debtor. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 111-116.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:151 (instruction to jury; person in whom title to collateral not material).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured

Transactions, §§ 253:3051 et seq (general validity of security agreement; enforceability of security interest).

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One (1) of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under Section 75-9-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 75-8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 75-9-104, 75-9-105, 75-9-106 or 75-9-107 pursuant to the debtor's security agreement.

(c) Subsection (b) is subject to Section 75-4-210 on the security interest of a collecting bank, Section 75-5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 75-9-110 on a security interest arising under Article 2 or 2A of Title 75, and Section 75-9-206 on security interests in investment property.

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b) (3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 75-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Definitions, see § 75-9-102.

Right of the debtor to use collateral, see § 75-9-205.

Buyer in ordinary course of business takes free of security interest, see § 75-9-320.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-203(1) through (3).

6. In general.
7. Attachment.
8. Description of collateral.
9. —After-acquired property.
10. —Crops.
11. —Description by reference.
12. —Extrinsic evidence.
13. —General descriptions.
14. —Serial numbers.
15. —Miscellaneous.
16. —Particular documents or acts creating security interest.
17. —Conditional sales agreement.
18. —Financing statement.
19. —Letters or course of conduct.
20. —Oral agreements.
21. —Promissory notes.
22. —Title documents.
23. —Trust receipts.
24. Perfection.
25. Possession.
26. Priority.
27. Proceeds.
28. Writing requirement.
29. —Formal requirements.
30. —Formal requirements; signature.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-203(1) through (3).

6. In general.

Security agreements relating to collateral in possession of secured party are not required to be in writing, subject to appli-

cability of the statute of frauds. In re Viscount Furn. Corp., 133 B.R. 360 (Bankr. N.D. Miss. 1991).

A lender's forbearance from bringing suit to recover for the borrower's selling of vehicles out of trust so that the borrower could remain in business and repay the money that he owed to the lender constituted the giving of "value" for the purpose of attachment of the lender's security interest. Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937 (Miss. 1990).

Under Wisconsin law, even though the perfection of a security interest in a motor vehicle is governed by the provisions of the Wisconsin motor vehicle statutes, the creation of a security interest in a vehicle is governed by the Wisconsin Uniform Commercial Code. Under Wisconsin UCC § 9-203(1), to create an enforceable security interest in goods not in the possession of the creditor, all of the following requirements must be met: (1) the debtor must sign a security agreement describing the collateral, (2) the creditor must give value, and (3) the debtor must have rights in the collateral. National Exch. Bank v. Mann, 81 Wis. 2d 352, 260 N.W.2d 716 (1978).

Under UCC § 9-203(2), security interest in personal property or fixtures attaches when debtor signs security agreement that is in proper form, value is given, and debtor has rights in collateral. In re County Green Ltd. Partnership, 438 F. Supp. 693 (W.D. Va. 1977).

In suit between secured party and debtor, as distinguished from suits involving third parties, Code § 9-203 provides sole requirements for enforceable security interest. In re Viscount Furn. Corp., 133 B.R. 360 (Bankr. N.D. Miss. 1991).

The only requirements necessary for an enforceable non-possessory security interest against a debtor are (a) in writing, (b) the debtor's signature and (c) a description of the collateral or kinds of collateral. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

7. Attachment.

A security interest is perfected when it has attached and all applicable steps required for perfection have been taken (see UCC § 9-303(1)). The term "attach" is used in Article 9 to describe the point at which property becomes subject to a security interest. UCC § 9-204 (now § 9-203) governs when a security interest attaches. It cannot attach until there is an agreement that it attach, value is given, and the debtor has rights in the collateral. *Thorp Sales Corp. v. Dolese Bros. Co.*, 453 F. Supp. 196 (W.D. Okla. 1978).

Under UCC § 9-203(1)(b) and § 9-204(1), a security interest attaches only where (1) there is a written security agreement, (2) value is given by the creditor, and (3) the debtor has rights in the collateral. *Queen of the N., Inc. v. LeGrue*, 582 P.2d 144 (Alaska 1978).

With respect to the distinction between "attachment" and "perfection" of a security interest, "perfection" is significant only when the question involves priority between security interests. "Attachment," on the other hand, determines the existence of a security interest as between the seller and the purchaser. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Buyers of mobile home who executed retail installment sales contract and security agreement (1) were "buyers in the ordinary course of business" under Arizona UCC § 9-307(1), even though they did not make down payment on home or take possession of it at time of entering into contract, (2) buyers' binding promise to pay was sufficient to meet requirements of Arizona UCC § 9-203(1), as amended in 1972, for attachment of security interest, and (3) security interest in home attached when buyers executed installment-purchase agreement and security agreement with seller. *Rex Fin. Corp. v. Mobile Am. Corp.*, 119 Ariz. 176, 580 P.2d 8 (1978).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

Purchase money security interest is not enforceable until after certain security agreements are signed by debtor, but fact that agreements were not signed until after installation of equipment and thus not enforceable at time of installation, did not prevent attachment of security interest at time of installation. *Honea v. Laco Auto Leasing, Inc.*, 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

8. Description of collateral.

Description of collateral in purchase-money security agreement by model and serial number alone meets requirements of UCC §§ 9-110 and 9-203(1)(b) where secured party is manufacturer or dealer in specialty appliances sold under a trade name. *Personal Thrift Plan of Perry, Inc.*

v. Georgia Power Co., 242 Ga. 388, 249 S.E.2d 72 (1978).

Where security agreement covering herd of cattle described collateral as "84 Holstein Cows and 14 Holstein Heifers, 1 to 2 ½ years of age," description of collateral was sufficient under UCC § 9-110 to create enforceable security interest under UCC § 9-203(1)(b); furthermore, where security agreement provided that debtors had "right to sell cows that ceased to be productive or to otherwise cull the herd; but they shall at all times retain a sufficient number of replacement heifers, or otherwise provide satisfactory replacements, to maintain a herd not smaller than that being now purchased" and that "Buyers agree to grant t[sic] Sellers a lien upon said property [cattle] and upon the replacements therefor..." use of term "replacement" was adequate to create security interest in after-acquired property (i.e., cattle) under UCC § 9-204(3). *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

Unlike a financing statement which is designed merely to put creditors on notice that further inquiry is prudent, a security agreement embodies the intentions of the parties and is the primary source to which a creditor's or potential creditor's inquiry is directed and must be reasonably specific; thus term "equipment" in omnibus clause of security agreement did not include automobiles owned by bankrupt corporation. In *re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Description of collateral contained in security agreement must be reasonably specific. In *re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Purpose of filing financing statement is notice to any third party; and requirement of description of collateral is satisfied if description reasonably informs third parties that certain identifiable item belonging to or in possession of debtor may be subject to prior security interest and that further inquiry is necessary to determine if it is exact item being offered them as collateral. *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala. App. 523, 274 So. 2d 80 (Civ. App. 1973).

Repair order reserving security interest in automobile in dealer's favor and signed

by customer adequately described automobile within meaning of Code § 9-203 by means of notations as to brand of automobile, year, model, speedometer reading and license number. *River Oaks Chrysler-Plymouth, Inc. v. Barfield*, 482 S.W.2d 925 (Tex. Civ. App. 1972).

9. —After-acquired property.

Where security agreement covering herd of cattle described collateral as "84 Holstein Cows and 14 Holstein Heifers, 1 to 2 ½ years of age," description of collateral was sufficient under UCC § 9-110 to create enforceable security interest under UCC § 9-203(1)(b); furthermore, where security agreement provided that debtors had "right to sell cows that ceased to be productive or to otherwise cull the herd; but they shall at all times retain a sufficient number of replacement heifers, or otherwise provide satisfactory replacements, to maintain a herd not smaller than that being now purchased" and that "Buyers agree to grant t[sic] Sellers a lien upon said property [cattle] and upon the replacements therefor..." use of term "replacement" was adequate to create security interest in after-acquired property (i.e., cattle) under UCC § 9-204(3). *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

10. —Crops.

Catfish raised by fish farmers did not qualify as "crop" for purpose of this section and Section 75-9-402. *Sunburst Bank v. Findley*, 76 B.R. 547 (Bankr. N.D. Miss. 1987).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) with respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on

June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

Where financing statement and security agreement purportedly gave secured party security interest in all of debtor's crops, but contained accurate legal description of certain farm lands belonging to debtor and omitted 3 other parcels of land on which debtor planted and harvested crops, crop description was insufficient to put third person on notice under UCC. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972).

Description of collateral in security instrument is sufficient if it includes all crops grown on land as collateral; crop does not have to be described as tobacco crop. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

Combined financing statement and security agreement referring to seven acres of cotton to be produced by debtor on lands of third party was fatally defective under Code § 9-203(1)(b) in that it failed to indicate whether debtor grew exactly seven acres of cotton and whether anyone else was also growing cotton on land referred to. *Piggott State Bank v. Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967).

11. —Description by reference.

Under UCC § 9-105(1)(h), which defines security agreement as one which "creates or provides for" a security interest, promissory note which included line, "This note is secured by a Security Inter-

est in subject personal property as per invoices," qualified as security agreement; incorporation of invoices into promissory note by reference was sufficient description of collateral under UCC §§ 9-203(1)(b) and 9-110, when coupled with existence of financing statement containing more specific description. *In re Amex-Protein Dev. Corp.*, 504 F.2d 1056 (9th Cir. Cal. 1974).

Where there was security agreement complete on its face and containing no reference to financing statement, maturity date appearing only on financing statement would not be read into security agreement, security agreement was enforceable according to its terms as between parties, and secured party's claim was therefore superior to that of assignee as successor in interest to debtor assignor when secured party took possession of merchandise. *In re Marta Coop.*, 74 Misc. 2d 612 (1973).

Security agreement describing collateral as "furniture as per attached listing," with no listing attached, did not adequately describe collateral. *J.K. Gill Co. v. Fireside Realty, Inc.*, 262 Or. 486, 499 P.2d 813 (1972).

Evidence establishes that the parties, by attaching the financing statements to the security agreement, incorporated the clarifying language of the financing statement into the security agreement, and clearly created a lien in seller's favor upon the inventory in all of the purchaser's stores. *In re Nickerson & Nickerson, Inc.*, 452 F.2d 56 (8th Cir. Neb. 1971).

12. —Extrinsic evidence.

Creditor held perfected security interest in inventory and accounts receivable of debtor where transactions between parties were evidenced by (1) recorded financing statement; (2) series of 11 promissory notes; (3) letter of debtor acknowledging debt and pledge of security; and (4) course of dealing between debtor and secured party. *In re Penn Hous. Corp.*, 367 F. Supp. 661 (W.D. Pa. 1973).

Where upon execution of first loan debtors personally guaranteed not only loan then made but also all future loans to be made to corporation, and later executed their assignment of beneficial interest in trust deed to be held by bank as collateral

security for first loan, and where 3 further loans were made, subject to continuing personal guarantees, each note except the first expressly referring to assignment of beneficial interest as part of collateral, and all debtors joined in signing financial statements clearly recognizing fact that assignment of beneficial interest was held by bank as security for loans, documents collectively satisfied requirements of § 9-203, thereby constituting valid security interest. In re Wambach, 343 F. Supp. 73 (N.D. Ill. 1972), *aff'd*, 484 F.2d 572 (7th Cir. Ill. 1973).

Notes, guarantee, absolute assignment and financing statement, when construed together, are conclusive evidence that beneficial interest in land trust was to serve as collateral for various loans, and these documents collectively satisfied requirements of UCC § 9-203, since security agreement terms need not be confined to a single document. In re Wambach, 343 F. Supp. 73 (N.D. Ill. 1972), *aff'd*, 484 F.2d 572 (7th Cir. Ill. 1973).

Oral testimony of secured party is without probative force to establish security interest, since it fails to satisfy statutory requirement that security agreement be in writing and signed by debtor. Mosley v. Dallas Entertainment Co., 496 S.W.2d 237 (Tex. Civ. App. 1973).

Where certain items of equipment were not described in security agreement covering debtor's drilling rigs, disputed items could not be included within security agreement by "external evidence" consisting of unsigned financing statement describing disputed items and evidence that debtor mortgaged and secured party took, pursuant to mortgage, security on all of debtor's equipment. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

In considering whether a security agreement covers particular collateral, the debtor's intent must be judged by the language of the security agreement and not by possible inferences from the surrounding circumstances. NCR v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963).

13. —General descriptions.

Secured party did not have security interest in inventory located at debtor's

retail furniture business where security agreement signed by debtor granted security interest in "all machinery, equipment and inventory maintained in the conduct of the debtor's business..." where debtor maintained two businesses, a furniture manufacturing business and a retail furniture store, where retail furniture business was not mentioned in security agreement and where debtor testified that inventory at retail store was not intended to be included in security agreement. In re Metzler, 405 F. Supp. 622 (N.D. Ala. 1975).

Description of collateral contained in security agreement must be reasonably specific; and term "equipment" in omnibus clause of security agreement did not include two automobiles owned by debtor corporation. In re Laminated Veneers Co., 471 F.2d 1124 (2d Cir. N.Y. 1973).

Description of collateral in security agreement is intended only to evidence agreement of parties and need only make possible identification of thing described; and description of all farm and other equipment now owned or hereafter acquired by debtor was sufficient description of after-acquired water irrigation equipment as collateral in which secured party had security interest. United States v. First Nat'l Bank, 470 F.2d 944 (8th Cir. Neb. 1973).

"All inventory" was adequate description of collateral, and it was unnecessary to set forth address where collateral was to be located, in description of collateral, when it was obvious or readily inferable that type of collateral covered would naturally be located in those places where debtor did business. In re Little Brick Shirthouse, Inc., 347 F. Supp. 827 (N.D. Ill. 1972).

The following descriptions in security agreements are sufficient to give notice of sale of machinery, hay and cattle: "All livestock, fish, supplies and other farm products, including those in inventory, now owned or hereafter acquired by Debtor, together with all increases, replacements, substitutions, and additions thereto..." and "All farm and other equipment now owned or hereafter acquired by Debtor together with all replacements, substitutions, additions, and accessions thereto." United States v. Pirnie, 339 F.

Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

A lender who had floor planned a car dealership borrower's inventory of new vehicles had an attached security interest in used vehicles not floor planned by the lender, where the security agreement stated that the collateral included "all motor vehicles and other inventory of every kind," and there was no evidence that the borrower did not believe that the security agreement covered the used cars. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937 (Miss. 1990).

The following description of the secured party, as it appeared in the extension of the security agreement, was sufficient to meet the Article 9 requirement that the description reasonably identify what was described: "all goods (as defined in Article 9 of the Uniform Commercial Code) whether now owned or hereafter acquired." *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

14. —Serial numbers.

Description of collateral in purchase-money security agreement by model and serial number alone meets requirements of UCC §§ 9-110 and 9-203(1)(b) where secured party is manufacturer or dealer in specialty appliances sold under a trade name. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978).

Security agreement and financing statement adequately described collateral as required by UCC §§ 9-203, 9-402, and 9-110 where, although secured party had erroneously omitted first digit of identification number of automobile, omitted digit represented information previously described in words on each document. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Where, after wrecked tractor was repaired, salvaged parts not used in repair and consisting of cab, front axle and chassis, engine, consisting of engine block and crank, together with other parts, some new and some from salvage from other vehicles, were used to rebuild another tractor, security agreement and financing statement containing identification of tractor built from salvage parts in terms

of year of original tractor and original Vehicle Identification Number as imprinted on salvaged engine block contained sufficient description of collateral to satisfy UCC. *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973).

The description of a caterpillar scraper by an incorrect serial number is insufficient in the absence of some physical description appearing of record in the security instrument which provides a key to the identity of the property. *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 134 S.E.2d 828 (1964).

15. —Miscellaneous.

Where security agreement and financing statement described collateral as watch and also identified watch by brand and model number, description of collateral was sufficient under UCC § 9-110; where security agreement described second item of collateral as, "ladies' bridal set white gold," but financing statement described collateral as, "one ladies' bracelet set-white gold," description of collateral in security agreement was sufficient to create security interest but description in financing statement did not reasonably identify collateral and thus secured party did not have perfected security interest in bridal set. *DWG, Inc. v. Peltier*, 563 P.2d 152 (Okla. 1977).

Order directing seizure of tractors and trailers which were listed as collateral in security agreement and which had been sold by debtor to defendants could not stand where there was factual question as to whether, under UCC § 9-306(2), creditor, by reason of its prior dealings with debtor, had authorized it to sell chattels free of any liens by asserting its right to receive "proceeds" if chattels were sold; order directing seizure of trailer not specifically mentioned in security agreement was improper under UCC §§ 9-110 and 9-203(1)(b) where general language in after-acquired property clause of security agreement was insufficient to cover vehicles other than those specifically listed, unless they were given and accepted in replacement of specified vehicles. *Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118 (2d Dep't 1974).

Where bank had possession of stock pledged as collateral for loans made to

decendent's son and prior course of dealing between parties including signed hypothecation agreement form provided ample evidence of agreement that stock would serve as collateral for continuing advances by bank to son, bank had enforceable security interest in stock, despite absence of adequate description of stock in stock assignment and hypothecation agreement. *Beyer's Estate v. Bank of Pa.*, 449 Pa. 24, 295 A.2d 280 (1972).

Omission from financing agreement covering automobile liability insurance policy of name of insurance company through which insured was to be insured rendered financing agreement void pursuant to Illinois Commercial Code provision requiring that security agreement contain description of collateral at time agreement is signed by debtor. *Cheatem v. Cook*, 8 Ill. App. 3d 425, 290 N.E.2d 707 (1st Dist. 1972).

16. —Particular documents or acts creating security interest.

"Agreement" in UCC § 9-204(1) means bargain of the parties and is used in UCC § 9-204 instead of "security agreement," which has reference to written contract for security interest, since under UCC § 9-203(1), not all security interests need be based on written security agreement. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

Nothing in either UCC §§ 9-105 or 9-203 requires that financing statement be separate piece of paper from security agreement, or that any particular words be used to evidence security interest, and agreement must merely provide for security interest, so that third party might know that such interest exists in particular piece of property. Thus, instrument signed by secured party and debtor was valid security agreement, and not merely financing statement, where agreement provided for security interest by use of wording "Secured Hereby" in stamped overprint, and where document met requirements of security agreement in other respects, i.e., it described collateral and was signed by debtor. *Morey Mach. Co. v. Great W. Indus. Mach. Co.*, 507 F.2d 987 (5th Cir. Fla. 1975).

Despite parties' intention and attempt to create security interest in favor of seller

of automobile, bill of sale, describing automobile and setting out terms of payment and insurance, and certificate of title, showing purchaser to be owner and seller to be holder of first lien, did not satisfy minimal Code requirements, since neither contained language actually conveying security interest. *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. Mo. 1973).

In transaction where lease is intended as security, debtor must sign written instrument (so-called lease) describing collateral in order to comply with Ohio version of UCC § 9-203; language to effect that security interest is being created or provided for need not be included. In re *Walter W. Willis, Inc.*, 30 Ohio Misc. 75, 313 F. Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971).

17. —Conditional sales agreement.

In action by seller to recover ring, where ring was mailed to buyer with conditional sales agreement, where buyer called seller and approved ring, where buyer gave ring to wife as gift, where buyer subsequently signed conditional sales contract and then defaulted on payments, and where wife gave ring as security for payment of promissory note, seller's security interest was superior to interest of wife and interest of party taking ring as security for note; security interest of seller attached within meaning of UCC § 9-204 at time of buyer's receipt and verbal approval of ring, even though security interest was not enforceable against buyer under UCC § 9-203(1) until buyer subsequently signed conditional sales agreement. *Mayor's Jewelers of Ft. Lauderdale, Inc. v. Levinson*, 39 Ill. App. 3d 16, 349 N.E.2d 475 (2d Dist. 1976).

The fact that Uniform Commercial Code was enacted subsequent to the Motor Vehicle Sales Finance Act of 1947 (69 Purdon's Pennsylvania Statutes §§ 601 et seq.), and there is a general repealing clause in the Code, is not necessarily conclusive on the issue of legislative intent, and, in view of § 9-201, providing that nothing in the article validates any charge or practice illegal under any rule of law or regulation governing instalment sales, and § 9-203, providing that transaction although subject to the article must also comply with the Motor Vehicle Sales Fi-

nance Act, the legislature did not intend to repeal the earlier law. *First Nat'l Bank v. Horwatt*, 192 Pa. Super. 581, 162 A.2d 60 (1960).

18. —Financing statement.

Although financing statement under UCC § 9-402(1) may be filed before security agreement is made or security interest otherwise attaches, financing statement standing alone does not create security interest in debtor's property, but merely serves notice that named creditor may have a security interest therein. Thus, where buyer of tractor did not execute security agreement granting security interest in tractor to seller, and where seller did not take possession of tractor when financing statement signed by buyer was executed, seller under UCC § 9-203(1)(a) and (b) had no valid security interest in tractor, even though financing statement was filed for record in office of county circuit clerk. *Gibbs v. King*, 263 Ark. 338, 564 S.W.2d 515 (1978).

Where seller of cattle received notes, signed by debtor, with notations that they were secured by financing statements filed, describing collateral and signed by both debtor and secured party, secured party did not have perfected security interest in collateral described in financing statement since no security agreement was signed granting security interest in collateral. *Barth Bros. v. Billings*, 68 Wis. 2d 80, 227 N.W.2d 673 (1975).

Although no formal security agreement was executed by parties, financing statement covering collateral, together with resolution of debtor's directors itemizing collateral and establishing that agreement in fact existed to grant security interest, constituted security agreement within meaning of Code § 9-203(1)(b). In *re Numeric Corp.*, 485 F.2d 1328 (1st Cir. Mass. 1973).

Financing statement cannot serve as security agreement where it does not grant creditor interest in collateral and does not identify obligation owed to creditor. *Mosley v. Dallas Entertainment Co.*, 496 S.W.2d 237 (Tex. Civ. App. 1973).

Although a financing statement may serve as a security agreement so long as it meets the minimum requirements of UCC § 9-203, this method of "draftsmanship

[is] likely to produce litigation and [is] not to be recommended." *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

The filing of a financing statement does not create a perfected security interest where there is no agreement to establish that a security interest was intended. *M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc.*, 98 N.J. Super. 378, 237 A.2d 500 (Ch. Div. 1967).

A security agreement, as distinguished from a financing statement, is not invalid because it is signed only by the debtor and not by the creditor or lending party. *National-Dime Bank v. Cleveland Bros. Equip. Co.*, 20 Pa. D. & C.2d 511 (1959).

19. —Letters or course of conduct.

In debtor's action against bank for conversion of certificate of deposit, which was issued by bank to debtor and constituted collateral for loan made to debtor by corporation affiliated with bank, where evidence showed (1) that debtor had borrowed \$8,000,000 from such affiliated corporation to develop real estate project, (2) that part of loan's proceeds had been set aside as reserve fund to pay interest on debtor's note and also taxes, fees, and other assessments on property being developed, (3) that lender corporation had requested debtor to purchase, from amount loaned, a \$200,000 certificate of deposit from defendant bank and pledge it with lender to supplement such reserve fund, (4) that debtor had purchased certificate and requested bank to deliver it to lender to hold under a pledge agreement, which actually was never executed, (5) that certificate had been renewed frequently during following three years, (6) that lender's correspondence concerning such renewals had repeatedly declared that certificate had been pledged to lender, and that debtor at no time had disputed such statements, and (7) that bank refused to deliver certificate to debtor after lender, in order to supplement reserve fund, had instructed bank to cash certificate and apply proceeds to lender's account, court held (1) that conduct of lender and debtor showed that they had intended to enter into security agreement under which certificate would be pledged to lender, (2) that since lender had possession of certificate (i.e., the collat-

eral), fact that such security agreement was oral did not affect its validity, since UCC § 9-203(1)(a) was intended to permit oral security agreements if creditor was in possession of collateral, (3) that under UCC § 9-204(1), a security agreement attaches as soon as parties so agree, creditor gives value, and debtor has rights in collateral, (4) that fact that debtor's letter to bank concerning issuance of certificate had referred to written pledge agreement to be prepared in future did not amount to explicit instruction that security interest was not to attach until parties' oral agreement had been reduced to writing, and (5) even if written security agreement actually had been condition to creation of lender's security interest in certificate, debtor's subsequent conduct had waived such condition, and he was estopped to assert it. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. Ga. 1978).

Letter allegedly establishing assignment of foreign exchange contract rights to bank did not measure up to security agreement under UCC since it failed to contain "description of the collateral" as required by § 9-203(1)(a). Moreover, bank failed to file financing statement, as required by §§ 9-302(1) and 9-303 and, thus, failed to obtain valid and perfected assignment of contract rights. Purported assignment was not exempt from filing under UCC § 9-302(10)(e) since, at time assignee allegedly assigned contract worth \$1,000,000, assignee's total "outstanding accounts or contract rights" were \$4,439,300; thus, assignment transferred just under 20 percent of assignee's accounts, including assigned contract right, which constituted "significant part" of assignee's outstanding accounts, especially in view of high absolute value of transaction at issue. *Miller v. Wells Fargo Bank Int'l Corp.*, 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. N.Y. 1976).

Signed letter identifying obligation secured, debtor, and collateral, and stating that arrangements detailed therein "are in accordance with our loan agreement" met the UCC § 9-203(1) requirements for a "security agreement". *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

A letter written by a subcontractor to his general contractor advising the latter of the assignment of his account for work performed to a bank, the written acceptance of the letter by the addressee, and the fact that the bank loaned money to the subcontractor taking the letter assignment as collateral, created a valid security interest which did not have to be perfected by the filing of a financing statement. *Citizens & S. Nat'l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965).

20. —Oral agreements.

Oral lease of automobile was unenforceable security interest; UCC § 9-203 provides that where collateral is not in possession of secured party, security interest is not enforceable against debtor or third parties unless debtor has signed security agreement sufficiently describing collateral. *Tate v. Gallagher*, 116 N.H. 165, 355 A.2d 417 (1976).

Where debtor transferred title to truck, owned by debtor, to creditor as security for loan pursuant to oral agreement, application for new certificate of ownership signed by debtor was security agreement under UCC § 9-203, and parol evidence was properly admitted to show oral agreement. *Kreiger v. Hartig*, 11 Wash. App. 898, 527 P.2d 483 (1974).

21. —Promissory notes.

Although it is evident under UCC § 9-402 that one instrument may qualify as both security agreement and financing statement, from which it follows that financing statement may also constitute security agreement if it otherwise qualifies as such, where parties executed only promissory note in standard form and short form financing statements and where neither financing statements nor note manifested intent to create or provide for security interest, there was no security agreement as required by UCC § 9-203 and thus creditor did not acquire security interest. *Crete State Bank v. Lauhoff Grain Co.*, 195 Neb. 605, 239 N.W.2d 789 (1976).

Under UCC § 9-105(1)(h), which defines security agreement as one which "creates or provides for" a security interest, promissory note which included line,

"This note is secured by a Security Interest in subject personal property as per invoices," qualified as security agreement; incorporation of invoices into promissory note by reference was sufficient description of collateral under UCC §§ 9-203(1)(b) and 9-110, when coupled with existence of financing statement containing more specific description. In re Amex-Protein Dev. Corp., 504 F.2d 1056 (9th Cir. Cal. 1974).

Where neither financing statement showing plaintiff to be secured party nor promissory notes payable to plaintiff contained words granting plaintiff security interest, plaintiff did not have enforceable security interest in debtor's assets which would entitle it to preferred claim in receivership proceedings. *L & V Co. v. Asch*, 267 Md. 251, 297 A.2d 285 (1972).

22. —Title documents.

Where bank loaned defendants money to purchase car and defendants did not have bank's lien noted on vehicle's certificate of title, as required by security agreement, bank was entitled to replevy car even though its lien was not noted on certificate of title, since under UCC § 9-203(1), failure of lender to perfect lien as against third parties does not invalidate lender's security interest as against original borrowers. *First Galesburg Nat'l Bank & Trust Co. v. Martin*, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (3d Dist. 1978).

Where (1) leasing company on November 29, 1974 sold automobile to buyer who paid cash and received possession of vehicle and also bill of sale which correctly described vehicle and identified it by its identification number, (2) buyer, who did not receive certificate of title to vehicle until January, 1975, applied for new certificate of title and title was recorded by Division of Motor Vehicles on January 27, 1975, (3) buyer later learned that certificate of title sent to him by lessor-seller was for another vehicle similar to one buyer had purchased, (4) lessor-seller, on January 27, 1975, entered into security agreement with bank in connection with loan and gave bank security interest in certain items of collateral which included vehicle sold to buyer, (5) bank filed financing statement covering buyer's vehicle and also sent vehicle's real certificate of

title to Division of Motor Vehicles for recording of bank's interest, and (6) bank, on lessor-seller's default on loan, sought to liquidate collateral, including vehicle sold to buyer, but buyer refused to relinquish possession of such vehicle, bank's alleged security interest in buyer's vehicle was unenforceable (1) because of uncertainty with which Wisconsin motor vehicle statutes purported to establish time of transfer of title to a motor vehicle, (2) express legislative intent that a certificate of title constituted only prima facie evidence of ownership, (3) necessity under UCC § 9-203(1)(c) that debtor (lessor-seller of vehicle in suit) have rights in buyer's vehicle that could be encumbered, and (4) fact that lessor-seller, after sale of vehicle in suit, had no rights therein that could be encumbered, since title to vehicle had already passed to buyer under UCC § 2-401(2) when vehicle was delivered to buyer. *National Exch. Bank v. Mann*, 81 Wis. 2d 352, 260 N.W.2d 716 (1978).

Where husband obtained loan from bank to purchase two used automobiles and signed two retail installment contracts purporting to give security interest in vehicles to bank, vehicles were registered in wife's name and certificates of title were issued listing her as new owner, bank was listed as first lienor on title certificates pursuant to statute (Connecticut Certificate of Title Act §§ 14-165 et seq.) providing that security interest in automobile could be perfected only by listing secured creditor's name and address on vehicle's title certificate, and husband and wife thereafter filed voluntary petitions in bankruptcy and bank sued to recover possession of vehicles from bankruptcy trustee, although bank's security interest was adequately perfected under both Certificate of Title Act and theory of "notice filing," it was not perfected under UCC § 9-203(1) because (1) wife alone received title to and possession of vehicles, (2) wife did not sign installment contracts that purported to create security interest in vehicles, and (3) husband did not acquire sufficient rights in collateral (vehicles) to be able to grant security interest therein to bank which could be perfected under Article 9. *Connecticut Bank & Trust Co. v. Schindelman*, 432 F. Supp. 1013 (D. Conn. 1977).

Application for certificate of title to house trailer, signed by buyer, describing security interest, and containing description of trailer, was sufficient to create security agreement within meaning of UCC § 9-203 and filing of application for certificate of title with the Secretary of State as provided by the state vehicle code constituted perfection of security interest; thus, pursuant to UCC § 9-301(1), seller's security interest was superior to subsequently attaching landlord's lien. *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 350 N.E.2d 356 (5th Dist. 1976).

In action by debtor against creditor and others to recover damages for conversion of his automobile, title certificate, which was signed by debtor and delivered to creditor as security for loan and which contained description of collateral, was sufficient to constitute signed security agreement within meaning of UCC § 9-203(1)(b) and gave creditor enforceable security interest in automobile. *Clark v. Vaughn*, 504 S.W.2d 550 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 17, 1974).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer under mistaken impression that dealer could not register title without such certificate, dealer sold trailers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail since he did not retain possession of collateral nor did dealer sign security agreement describing collateral as required by UCC § 9-203(1). *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

23. —Trust receipts.

Requirement that security agreement be in existence in order to create security interest may be satisfied by instrument

which takes form of trust receipt. In *re Mann*, 318 F. Supp. 32 (W.D. Va. 1970).

24. Perfection.

A lender's attached purchase money security interest in an automobile dealership's inventory of used vehicles was not properly perfected under the Mississippi Motor Vehicle Title Law where the lender never filed a financing statement. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937 (Miss. 1990).

Ordinarily a security interest is perfected by filing a financing statement or by the creditors having possession of the collateral. *M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc.*, 98 N.J. Super. 378, 237 A.2d 500 (Ch. Div. 1967).

When the controversy is between the secured seller and the debtor-buyer, the interest of the secured party is protected and it is immaterial whether the steps were taken which would be necessary to perfect the interest of the secured party as against innocent third persons. *Rottman v. Wallace*, 52 Luz. Legal Reg. Rep. 187 (Pa. 1962).

25. Possession.

Under UCC §§ 9-203(1) and 9-204(1), there are four basic requirements to the creation of a valid security interest: (1) a security agreement must be entered into, (2) the agreement must be in writing or the creditor must be in possession of the collateral, (3) the debtor must have rights in the collateral, and (4) the secured party must give value. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

The steps that must be taken as a prerequisite to the creation of a security interest that is enforceable against the debtor are stated in UCC §§ 9-203(1)(a) and (b) and 9-204(1) and may be summarized as follows: (1) the parties must enter into a security agreement; (2) they must reduce as much of that agreement to writing as is necessary to satisfy UCC § 9-203(1)(b), which also requires that the debtor sign such writing, or else possession of the collateral must be given to the creditor; (3) the debtor must acquire rights in the collateral; and (4) the secured party must give value. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

The security agreement need not be in writing where the collateral is in the possession of the secured party. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971).

Account receivable is intangible which cannot be “possessed” within Code § 9-203(1)(a), and under Code § 9-203(1)(b) security interest therein is unenforceable in absence of security agreement signed by debtor. *M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc.*, 98 N.J. Super. 378, 237 A.2d 500 (Ch. Div. 1967).

A seller who has surrendered possession of automobiles and has failed to obtain a signed security agreement cannot enforce his security interest as against third parties. *McDonald v. Peoples Auto. Loan & Fin. Corp. of Athens, Inc.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967).

26. Priority.

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer’s invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband’s name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff’s security interest in automobile validly attached under UCC § 9-204(1), since husband had “right” in automobile as mat-

ter of law and could use it for collateral, even though wife was vehicle’s registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as “debtor” and did not refer to wife who actually owned automobile, (4) defendant’s security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant’s financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant’s security interest in automobile was perfected, and (6) since defendant gave “value” under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant’s preexisting claim, defendant’s perfected security interest in vehicle extended to entire amount of defendant’s loan to husband and wife, and such perfected security interest was superior to plaintiff’s unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Where buyer of motorcycle signed security agreement which contained description of collateral, buyer agreed that security interest attach to vehicle, value was given by bank which advanced part of purchase price, and title to vehicle and physical possession were given to buyer by seller, whereby buyer acquired rights in collateral, security interest of bank attached pursuant to provisions of UCC §§ 9-203 and 9-204, notwithstanding seller’s failure to record bank’s lien as required by seller’s contract with bank; thus, upon buyer’s default, bank had right to possession of collateral pursuant to UCC § 9-503, notwithstanding nonrecording of its lien, and seller was not liable to bank for breach of contract to record lien since loss was caused by bank’s failure to act and by buyer’s flight and his concealment of motorcycle, not by seller’s breach. *Kansas State Bank v. Overseas Motosport, Inc.*, 222 Kan. 26, 563 P.2d 414 (1977).

Delivery of appliances subject to security agreement to construction site for use in debtor’s apartment construction project was sufficient to give debtor rights in such

collateral for purposes of UCC § 9-203(2). In re County Green Ltd. Partnership, 438 F. Supp. 693 (W.D. Va. 1977).

UCC does not abrogate, modify, affect or abridge the equitable doctrine of subrogation and, thus, surety on subcontractor's bond was not required to file under UCC Article 9 in order to preserve its priority based on subrogation. Argonaut Ins. Co. v. C & S Bank, 140 Ga. App. 807, 232 S.E.2d 135 (1976).

Contractor had rights in funds retained by city under construction contract, notwithstanding contract conditioned payment of retainage upon contractor's first paying all subcontractors and materialmen and contractor had not made all such payments; thus bank's security agreements were sufficient to give it security interest in retained funds, which had been assigned to bank, superior to that of general creditors. Corpus Christi Bank & Trust v. Smith, 525 S.W.2d 501 (Tex. 1975).

Where buyer paid for used automobiles with check which was dishonored after buyer executed "trust receipts" agreement which specified that bank would hold security interest in automobiles as collateral for loan, bank had unperfected security interest in automobiles which was superior to seller's right to reclaim cars, seller's remedy being an action against buyer for price of delivered goods under Code § 2-709. Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

The perfected security interest of a retail finance corporation who purchased a credit agreement signed by a "buyer in the ordinary course of business" from an automobile dealer had priority over the perfected interests of a bank which furnished floor plan financing to finance the dealer's acquisition and holding of motor vehicles for use and resale in the course of the dealer's business. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261 (1968).

27. Proceeds.

Insurance monies paid for loss of collateral by theft are "proceeds" within meaning of UCC § 9-306(1). Insurance Mgt. Corp. v. Cable Servs., Inc., 359 So. 2d 572 (Fla. App. 1978).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. Kelman v. Bohi, 27 Ariz. App. 24, 550 P.2d 671 (1976).

28. Writing requirement.

Under UCC §§ 9-203(1) and 9-204(1), there are four basic requirements to the creation of a valid security interest: (1) a security agreement must be entered into, (2) the agreement must be in writing or the creditor must be in possession of the collateral, (3) the debtor must have rights in the collateral, and (4) the secured party must give value. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

An agreement that a security interest attach must be in writing under UCC § 9-203. In re Dean & Jean Fashions, Inc., 329 F. Supp. 663 (W.D. Okla. 1971).

Alleged security interest in stock was unenforceable under UCC § 9-203(1) where (1) creditor's petition in intervention alleged that stock was in debtor's possession and (2) creditor's deposition admitted that no written security agreement had ever been executed by debtor. Stromblad v. Wilderness Adventurer, Inc., 577 P.2d 918 (Okla. Ct. App. 1978).

The steps that must be taken as a prerequisite to the creation of a security interest that is enforceable against the debtor are stated in UCC §§ 9-203(1)(a) and (b) and 9-204(1) and may be summarized as follows: (1) the parties must enter into a security agreement; (2) they must reduce as much of that agreement to writing as is necessary to satisfy UCC § 9-203(1)(b), which also requires that the debtor sign such writing, or else possession of the collateral must be given to the creditor; (3) the debtor must acquire rights in the collateral; and (4) the secured party must give value. Mammoth Cave Prod. Credit Ass'n v. Oldham, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

There cannot be a security interest in collateral in the possession of the debtor which will be valid as against subsequent claimants unless there is a signed written

security agreement, which in effect is a statute of frauds requirement. *McDonald v. Peoples Auto. Loan & Fin. Corp. of Athens, Inc.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967).

Bank which could proffer no writing signed by debtor giving, even sketchily, terms of security agreement could not, under Code § 9-203(1)(b), enforce security interest in debtor's personalty as against levying judgment creditor. *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 380 F.2d 355 (4th Cir. Md. 1967).

Trust receipts meet the minimum requirements of the UCC where they are writings signed by the debtor granting security interests in specifically described merchandise to the distributor. In *re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

29. —Formal requirements.

Under UCC § 9-203(1) and (2), debtor's option to purchase motor grader from third party, when exercised, gave rise to property right in grader in which debtor could create security interest, since Uniform Commercial Code does not require debtor to have rights in collateral at time security agreement is made. If debtor does not have rights in collateral at time security agreement is made, creditor's security interest simply remains unenforceable until at some future time all events of attachment (agreement, value given, and debtor's rights in collateral) occur. *Empire Mach. Co. v. Union Rock & Materials Corp.*, 119 Ariz. 145, 579 P.2d 1115 (Ct. App. 1978).

Where enforceable security interest is created by written agreement which is terminable at specified date, security interest is valid only until expiration date; thereafter, in order for there to be enforceable security interest, new security agreement must be executed. *Bewigged by Suzzi, Inc. v. Atlantic Dep't Stores, Inc.*, 49 Ohio App. 2d 65, 359 N.E.2d 721 (1976).

Where supplier sold truck body kits to debtor, but debtor failed to pay for kits, where bank loaned money to debtor and filed financing statement which listed body kits as collateral, but no separate written security agreement was entered into between bank and debtor, and where body kits were subsequently sold back to

supplier and consigned to debtor under agreement giving supplier security interest in kits and supplier filed financing statement covering body kits, bank's financing statement was not effective as security agreement, as required by UCC § 9-203(1)(b), since it did not contain language which specifically created or granted security interest in described collateral. *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. Kan. 1975).

Financing statement which was in writing, signed by debtor, adequately described collateral, and which incorporated security agreement under UCC § 9-105(h) met requirement of UCC § 9-203(1)(b) that debtor must sign security agreement containing description of collateral. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where first section of security agreement on SBA form did not refer to classifications of collateral listed in second section but granted security interest in borrower-debtor's equipment, furniture, and fixtures, fact that second section boxes labeled inventory, accounts receivable, and contract rights were checked did not give security interest therein. *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700 (10th Cir. Okla. 1972).

In an action for conversion by seizure and sale of property covered by security agreement allegedly void presented triable issues of fact as to the validity of the agreement, precluding summary judgment, where agreement was undated, did not specify the amount of the debt, or the terms of repayment and was signed by an individual in his own name and not in his capacity as an officer of the debtor corporation but the agreement did name the debtor corporation in the body thereof, listed the collateral covered by it, and the individual signing it was in fact the president of the debtor authorized to sign. *Cherno v. Bank of Babylon*, 57 Misc. 2d 801 (1968).

30. —Formal requirements; signature.

Security interest is not rendered invalid by lack of collateral owner's signature on financing statement where name and sig-

nature of debtor are present, since minor errors which are not seriously misleading are excused. *United States Small Bus. Admin. v. Guaranty Bank & Trust Co.*, 874 F.2d 997 (5th Cir. 1989).

Security agreement was valid under UCC § 9-203, although it was signed before description of collateral was inserted, where description of collateral was subsequently written into agreement so that it accurately reflected intent of both parties. *In re Allen*, 395 F. Supp. 150 (E.D. Ill. 1975).

In transaction where lease is intended as security, debtor must sign written instrument (so-called lease) describing collateral in order to comply with Ohio version of UCC § 9-203; language to effect that security interest is being created or provided for need not be included. *In re Walter W. Willis, Inc.*, 30 Ohio Misc. 75, 313 F. Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971).

Purchase money security interest is not enforceable until after certain security agreements are signed by debtor, but fact

that agreements were not signed until after installation of equipment and thus not enforceable at time of installation, did not prevent attachment of security interest at time of installation. *Honea v. Laco Auto Leasing, Inc.*, 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

Security agreement which named the debtor corporation in the body thereof, listed the collateral covered by it, and the individual signing it was in fact the president of the debtor authorized to sign by resolution on file with the bank, and was signed on a line preceded by the word "by" with corporate seal affixed, raised issues as to the validity of the security agreement sufficient to defeat a motion for summary judgment although the agreement was undated, did not specify the amount of the debt, nor the terms of repayment and was signed by the individual in his own name and not in his capacity as an officer of the debtor corporation. *Cherno v. Bank of Babylon*, 57 Misc. 2d 801 (1968).

RESEARCH REFERENCES

ALR. Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, relating to installment contracts for purchase of property. 24 A.L.R.2d 1074.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1). 67 A.L.R.3d 308.

Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203. 100 A.L.R.3d 940.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402. 3 A.L.R.4th 502.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 267-281.

78 Am. Jur. 2d, Warehouses § 57.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:9 (instruction to jury; transaction subject to other regulatory statutes).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:73 (sufficiency of description; "Proceeds").

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:182, 9:183, 9:184 (enforceability of interest; formal requisites).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:201 (instruction to jury; when security interest attaches; execution of security agreement or possession of collateral by creditor).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:214 (when security interest attaches; after-acquired property; instruction to jury; execution of security agreement; existence of goods).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3051 et seq. (general validity of security agreement; enforceability of security interest).

CJS. 79 C.J.S., Secured Transactions §§ 34-49.

72 C.J.S., Pledges §§ 19, 20.

93 C.J.S., Warehousemen and Safe Depositaries §§ 50-55.

Law Reviews. The Effect of Bankruptcy and Encumbrances on Mineral In-

terests in Mississippi. 53 Miss. L. J. 551, December, 1983.

Purpose of filing financing statement is notice to any third party; and requirement of description of collateral is satisfied if description reasonably informs third parties that certain identifiable item belonging to or in possession of debtor may be subject to prior security interest and that further inquiry is necessary to determine if it is exact item being offered them as

collateral. *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala. App. 523, 274 So. 2d 80 (Civ. App. 1973).

Trust receipts meet the minimum requirements of the UCC where they are writings signed by the debtor granting security interests in specifically described merchandise to the distributor. In *re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

§ 75-9-204. After-acquired property; future advances.

(a) Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral.

(b) A security interest does not attach under a term constituting an after-acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten (10) days after the secured party gives value; or

(2) A commercial tort claim.

(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

JUDICIAL DECISIONS

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II. Under former § 75-9-204.

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39. Accounts receivable.

40. Inventory.

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III. Pre-Uniform Commercial Code Decisions.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-204.

A. Generally.

6. In general.

While both the time of filing rule and the time of attachment rule have merit, neither rule furthers the important policy of providing notice to subsequent creditors of the prior existing security interest as well as a rule based upon the last event; by requiring that the determination of the proper place to file be made at the time when the last event occurs upon which the perfection of the creditor's security interest is based, the last event rule insures that the place in which the filing is made and the contents of the filing will reflect any changes made by the debtor between the time of attachment and the time of filing, regardless of which came first. The filer would be more likely to reflect the location and status of the debtor which exists at the time a subsequent creditor is searching the records to determine what prior security interests have been perfected against the debtor and therefore will be more likely to be found by such a subsequent creditor. Accordingly, the secured party must determine the correct place in which to file his financing statement on the basis of the facts existing at the time when the last event necessary for the perfection of his security interests occurs. *Matter of Hammons* (C.A.5 (Miss.) 1980) 614 F. 2d 399

Where there is no authority to subject property to a security interest, the creditor has no security interest therein.

Branch v. Steph, 389 F.2d 233 (10th Cir. Okla. 1968).

If any element specified by Sec 9-204(1) is not satisfied the security interest is not perfected. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

Subsection (3) of § 9-204 is not irreconcilable with subsection (2) of § 9-108. *Erb v. Stoner*, 19 Pa. D. & C.2d 25 (1959).

7. Creation of security interest.

In an action by a bank against a purchaser of truck bodies to obtain monies paid by the purchaser to the Internal Revenue Service after the IRS had issued a tax levy against funds owing to the seller of truck bodies, the trial court properly granted judgment for the bank where the contract between the seller and the purchaser had been delivered, assigned and accepted by the bank to secure a loan to the seller and, thereby, gave the bank a perfected security interest in the contract, an instrument under § 75-9-105, which held priority over the tax lien of the IRS which had never been filed at the principal place of business of the taxpayer. *International Harvester Co. v. Peoples Bank & Trust Co.*, 402 So. 2d 856 (Miss. 1981).

Where creditor and debtor agreed to postpone time of attaching of creditor's security interest in debtor's collateral until event of default should occur, creditor under UCC § 9-204(1) had no security interest in collateral until event of default occurred. *Allegaert v. Chemical Bank*, 454 F. Supp. 341 (E.D.N.Y. 1978), rev'd on other grounds and remanded, 657 F.2d 495 (2d Cir. N.Y. 1980).

In debtor's action against bank for conversion of certificate of deposit, which was issued by bank to debtor and constituted collateral for loan made to debtor by corporation affiliated with bank, where evidence showed (1) that debtor had borrowed \$8,000,000 from such affiliated corporation to develop real estate project, (2) that part of loan's proceeds had been set aside as reserve fund to pay interest on debtor's note and also taxes, fees, and other assessments on property being developed, (3) that lender corporation had requested debtor to purchase, from amount loaned, a \$200,000 certificate of deposit from defendant bank and pledge it with lender to supplement such reserve

fund, (4) that debtor had purchased certificate and requested bank to deliver it to lender to hold under a pledge agreement, which actually was never executed, (5) that certificate had been renewed frequently during following three years, (6) that lender's correspondence concerning such renewals had repeatedly declared that certificate had been pledge to lender, and that debtor at no time had disputed such statements, and (7) that bank refused to deliver certificate to debtor after lender, in order to supplement reserve fund, had instructed bank to cash certificate and apply proceeds to lender's account, court held (1) that conduct of lender and debtor showed that they had intended to enter into security agreement under which certificate would be pledged to lender, (2) that since lender had possession of certificate (i.e., the collateral), fact that such security agreement was oral did not affect its validity, since UCC § 9-203(1)(a) was intended to permit oral security agreements if creditor was in possession of collateral, (3) that under UCC § 9-204(1), a security agreement attaches as soon as parties so agree, creditor gives value, and debtor has rights in collateral, (4) that fact that debtor's letter to bank concerning issuance of certificate had referred to written pledge agreement to be prepared in future did not amount to explicit instruction that security interest was not to attach until parties' oral agreement had been reduced to writing, and (5) even if written security agreement actually had been condition to creation of lender's security interest in certificate, debtor's subsequent conduct had waived such condition, and he was estopped to assert it. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. Ga. 1978).

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for \$180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior \$60,000 debt, indorsed them to creditor's order, and de-

livered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor \$135,000 on notes and notes were still in creditor's possession as collateral for payment of \$28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus owe to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it, delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25, 1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first credi-

tor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned to plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff nor its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) because of first creditor's failure to indorse them to plaintiff's order. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

To obtain a valid security interest in collateral, the secured party must satisfy the following requirements of UCC § 9-204(1): (1) there must be an agreement between the secured party and the debtor that the secured party will have a security interest in the collateral, (2) the secured party must give value for the security agreement, and (3) the debtor must have rights in the collateral. *First Westside Nat'l Bank v. Llera*, 176 Mont. 481, 580 P.2d 100 (1978), overruled on other grounds, 259 Mont. 117, 855 P.2d 105 (1993).

The steps that must be taken as a prerequisite to the creation of a security interest that is enforceable against the debtor are stated in UCC §§ 9-203(1)(a) and (b) and 9-204(1) and may be summarized as follows: (1) the parties must enter into a security agreement; (2) they must reduce as much of that agreement to writing as is necessary to satisfy UCC § 9-203(1)(b), which also requires that the debtor sign such writing, or else possession of the collateral must be given to the creditor; (3) the debtor must acquire rights in the collateral; and (4) the secured party must give value. *Mammoth Cave*

Prod. Credit Ass'n v. Oldham, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Under UCC § 9-204(1), (1) requirement that there must be "agreement" that security interest attach means that bargain of parties, from which security interest arises, must address itself to specific property or type of property, such as inventory; (2) requirement that "value" must be given for security interest is intended to insure that debtor giving security interest receive some consideration in return for substantial rights transferred to secured party; and (3) requirement that debtor acquire "rights" in collateral is satisfied by showing that debtor gained possession of collateral under agreement endowing him with any interest other than naked possession, such as debtor's own security interest in such collateral. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

"Security interest" can be created without using those words, and here actions and conduct of parties, their testimony before referee in bankruptcy, and agreement as expressed in stipulation clearly established landlord's security interest in tenant-bankrupts' crops. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

For a lender to obtain a security interest in the inventory of a borrower there must be an agreement that it attach, that value be given, and the borrower has rights in the collateral. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

The conditions for a valid and enforceable security agreement under the Uniform Commercial Code are: (1) a written agreement signed by the debtor granting a security interest in collateral; (2) a description of the collateral; (3) value given by the secured party; and (4) debtor's rights in the collateral. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

8. Agreement requirement.

"Agreement" in UCC § 9-204(1) means bargain of the parties and is used in UCC § 9-204 instead of "security agreement," which has reference to written contract for security interest, since under UCC § 9-203(1), not all security interests need

be based on written security agreement. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

Under UCC § 9-204 a security interest does not attach until there is (1) agreement that it attach, (2) value is given, and (3) debtor has rights in collateral; thus, prospective purchaser of corporate stock did not acquire security interest therein where he executed promissory note for agreed price and his note together with share certificates were placed in possession of third party for safekeeping under agreement that certificates, already made out in prospective purchaser's name, would be delivered to him when note was paid, since evidence failed to establish an agreement, either oral or written, which would give rise to implication that security interest in stock was ever created; furthermore, under UCC §§ 8-301 and 8-313 there was no evidence that prospective purchaser received any rights in stock which was alleged to have served as collateral, since there was no evidence of delivery to prospective purchaser or his agent and the fact that stock was issued in his name was insufficient to establish delivery. *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 518 P.2d 1097 (1974).

A letter written by a subcontractor to his general contractor advising the latter of the assignment of his account for work performed to a bank, the written acceptance of the letter by the addressee, and the fact that the bank loaned money to the subcontractor taking the letter assignment as collateral, created a valid security interest which did not have to be perfected by the filing of a financing statement. *Citizens & S. Nat'l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965).

9. —Existence of agreement.

Although bank on specified date prior to making loan had possession of securities of borrower, who wanted to use such securities as collateral for proposed loan, no agreement under UCC § 9-204(1) arose between the parties that bank should have security interest in such securities until date on which bank accepted collateral note executed by borrower and bound itself to lend borrower amount of money provided for in collateral note. *Florida*

Nat'l Bank v. State ex rel. Department of Ins., 350 So. 2d 365 (Fla. App. 1977).

In action by seller to recover ring, where ring was mailed to buyer with conditional sales agreement, where buyer called seller and approved ring, where buyer gave ring to wife as gift, where buyer subsequently signed conditional sales contract and then defaulted on payments, and where wife gave ring as security for payment of promissory note, seller's security interest was superior to interest of wife and interest of party taking ring as security for note; security interest of seller attached within meaning of UCC § 9-204 at time of buyer's receipt and verbal approval of ring, even though security interest was not enforceable against buyer under UCC § 9-203(1) until buyer subsequently signed conditional sales agreement. *Mayor's Jewelers of Ft. Lauderdale, Inc. v. Levinson*, 39 Ill. App. 3d 16, 349 N.E.2d 475 (2d Dist. 1976).

Promissory notes which contained no language expressly or by implication granting to seller lien or interest in automobile as security for repayment of loan, but merely contained reference to automobile by make, year and serial number, did not constitute security agreement and did not create security interest in seller; and deficiency could not be supplied by notation contained in certificate of ownership designating seller as "secured party." *First County Nat'l Bank & Trust Co. v. Canna*, 124 N.J. Super. 154, 305 A.2d 442 (App. Div. 1973).

Seller of internal equipment to be used as saw mill had security interest in equipment which attached before equipment became fixtures attached to saw mill, notwithstanding fact that sales contract was signed four days after equipment had been delivered and installed; thus, under Code § 9-313 seller had priority over saw mill mortgagee. *GECC v. Pennsylvania Bank & Trust Co.*, 56 Pa. D. & C.2d 479 (1972).

Fact that all of parties entered into performance of agreements on date of execution and continued in faithful performance according to terms of agreements for period of over 14 months is convincing proof that they intended their respective interests attach upon execution of agree-

ments. *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969).

10. —Sufficiency of agreement.

Security interest of creditor in stock placed in escrow to secure loan attached at time of execution of pledge and escrow agreement; provisions of security agreement specifying certain contingencies upon default before escrow company could deliver stock to creditor did not constitute explicit agreement to postpone attachment of the security interest within meaning of UCC § 9-204(1). *In re Copeland*, 531 F.2d 1195 (3d Cir. Del. 1976).

Bank did not have security interest in equipment in debtors possession under agreement which provided, *inter alia*, that "the said bank shall also have a lien...upon all property of the undersigned of every name and nature whatsoever, delivered to the Bank for safekeeping or otherwise..." where agreement provided in detailed and meticulous manner that debtor's property in bank's possession should be loan collateral; clause in question was ambiguous and, since document was drafted by bank, it would be construed against bank. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53 (5th Cir. Fla. 1975).

Where notes representing security agreement did not refer to after acquired collateral as collateral, reference to such collateral in financing statement cannot be basis for creation of security interest therein under UCC § 9-204(3). *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971), on remand, 125 Ga. App. 126, 186 S.E.2d 542 (1971).

11. Priority.

Where buyer of motorcycle signed security agreement which contained description of collateral, buyer agreed that security interest attach to vehicle, value was given by bank which advanced part of purchase price, and title to vehicle and physical possession were given to buyer by seller, whereby buyer acquired rights in collateral, security interest of bank attached pursuant to provisions of UCC §§ 9-203 and 9-204, notwithstanding seller's failure to record bank's lien as required by seller's contract with bank;

thus, upon buyer's default, bank had right to possession of collateral pursuant to UCC § 9-503, notwithstanding nonrecording of its lien, and seller was not liable to bank for breach of contract to record lien since loss was caused by bank's failure to act and by buyer's flight and his concealment of motorcycle, not by seller's breach. *Kansas State Bank v. Overseas Motosport, Inc.*, 222 Kan. 26, 563 P.2d 414 (1977).

Where seller of cattle received notes, signed by debtor, with notations that they were secured by financing statements filed, describing collateral and signed by both debtor and secured party, secured party did not have perfected security interest in collateral described in financing statement since no security agreement was signed granting security interest in collateral. *Barth Bros. v. Billings*, 68 Wis. 2d 80, 227 N.W.2d 673 (1975).

In action between lender who held unperfected security interest in automobiles and car dealer who sold collateral to debtor, seller's right to reclaim goods under UCC § 2-702(3), when buyer's check for purchase price was dishonored by bank, did not have priority over lender's unperfected security interest in automobiles which arose when lender, who qualified as "purchaser" under UCC § 1-201, acquired certificates of title; under UCC § 2-403(1), once certificates of title were delivered, debtor acquired voidable title and could convey enforceable right in automobiles to lender as good faith purchaser for value, even though debtor's check to seller of automobiles was later dishonored. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 519 P.2d 354 (1974).

Creditor's security interest in accounts of joint venture attached under UCC § 9-204 but was not perfected under UCC § 9-302(1) and was subordinated to federal tax lien where only financing statement filed covered earlier loan to one joint venturer and did not give notice to potential creditors of joint venture that security interest was in existence against joint venture. *United States v. Merchants & Marine Bank*, 292 So. 2d 151 (Miss. 1974).

Lack of perfection of security interest under Article 9 of UCC relates only to

priority over other creditors' interests in collateral, and security agreement as between parties themselves and secured party's rights over collateral as against debtor are unaffected by failure to perfect security interest; thus, assignee for security purposes of beneficial interest in land trust was entitled to redeem from tax sale of real estate which comprised corpus of trust notwithstanding his failure to perfect security interest by filing financing statement. Application of County Treasurer of Du Page County, 16 Ill. App. 3d 385, 306 N.E.2d 743 (2d Dist. 1973).

Where neither party has perfected his security interest, UCC § 9-312(5) determines priority between conflicting interests in same collateral; thus, where plaintiff-landlord had lien on tenant's property under terms of recorded lease which was valid under UCC § 9-204(3), but which was not perfected due to plaintiff's failure to file financing statement with secretary of state as required by UCC § 9-401(1)(c), and where defendant sold bar equipment to plaintiff's tenants under conditional sales contract and acquired purchase money security interest under UCC § 9-107(a), which was not perfected under UCC § 9-302(1) since defendant failed to obtain signatures of parties as required by UCC § 9-402(1), and where defendant subsequently repossessed and sold property in question, defendant's security interest took priority over plaintiff's either under theory that defendant perfected its security interest by repossessing and selling property or under theory that defendant's security interest attached prior to plaintiff's. *Engelsma v. Superior Prods. Mfg. Co.*, 298 Minn. 77, 212 N.W.2d 884 (1973).

Bank which had acquired prior a perfected security interest in all the present and future inventory of a lumber company had a lien superior to that of the seller of standing timber who had a lien, under an oral agreement, on the lumber manufactured as the trees were severed. *Barry v. Bank of N.H.*, 112 N.H. 226, 293 A.2d 755 (1972).

12. —Bankruptcy as affecting priority.

Where manufacturing company, which had been making gun cabinets for another

company under contract providing that such other company would furnish basic materials for cabinets, that it reserved title to such materials, and that it would buy assembled cabinets from manufacturer at reduced price, became insolvent and ceased operations after obtaining Small Business Administration loan from two banks that required manufacturer to execute security agreement in their favor in manufacturer's present and after-acquired inventory, and where such banks, after perfecting their security interests in such inventory by filing financial statements that were proper in form, content, and place of filing, attempted to enforce such security interests by taking possession of manufacturer's inventory, as against asserted interest therein of company supplying materials to manufacturer, (1) interest of supplier of materials was purchase-money security interest under UCC § 9-107(b); (2) such interest was not perfected under UCC § 9-304 by filing of financing statement concerning such materials and giving notice of claim thereto; and (3) under UCC § 9-312(3), such unperfected interest had no priority over perfected security interests of banks in such materials (which were part of manufacturer's inventory), where security interests of banks had properly attached under UCC § 9-204(1). *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

Under secured note issued 6 months prior to bankruptcy covering both overdue and future accounting services, value was not given until work was actually performed, and claim for services rendered within 4 months of bankruptcy was not entitled to secured status. *E.F. Corp. v. Smith*, 496 F.2d 826 (10th Cir. Kan. 1974).

Where party to sale of stock intended that no security interest would be capable of attaching until event of uncured default in buyer's payments, no pledge was created as of date sale was transacted, and uncured default did not occur at time buyer filed reorganization petition, seller did not possess perfected security interest and did not have claim to stock superior to that of trustee in bankruptcy. In re *Dolly Madison Indus., Inc.*, 351 F. Supp. 1038 (E.D. Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir.

Pa. 1973), *aff'd*, 480 F.2d 918 (3d Cir. Pa. 1973).

13. "Rights in collateral".

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d), financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in

automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Under UCC § 9-204(1), debtor must have rights in collateral before secured party can acquire security interest in debtor's property. This requirement is fundamental, and a security interest cannot be created in any other property. *Anthony v. Community Loan & Inv. Corp.*, 559 F.2d 1363 (5th Cir. Ga. 1977), *reh'g denied*, 564 F.2d 416 (5th Cir. Ga. 1977).

Under UCC § 9-204, no one can give a valid security interest in property unless he has rights therein. *Texas State Bank v. Foremost Ins. Co.*, 477 S.W.2d 652 (Tex. Civ. App. 1972), *ref. n.r.e.* (June 28, 1972).

14. —Documents of title.

Defendant finance company did not acquire security interest in two vehicles superior to that of plaintiff bank, by virtue of automobile dealer's execution and filing of inventory security agreements in favor of the defendant covering vehicles, where vehicles had originally been sold by dealer and conditional sales contracts were assigned to plaintiff subject to recourse contract with dealer, where plaintiff had at all times had possession of certificates of ownership for vehicles and was listed as legal owner thereon, where dealer had possession of vehicles as result of their repossession by plaintiff pursuant to recourse agreement following purchasers' defaults, and where plaintiff had demanded, unsuccessfully, that dealer pay balance due on conditional sales contracts as provided by recourse agreement; under UCC § 9-204, dealer, as debtor, did not acquire rights in subject motor vehicles sufficient to transfer valid security interest to defendant; nor could defendant, by advancing flooring money to dealer be considered buyer in ordinary course of business, but was rather financing agency only, excluded from protection created by UCC § 9-307. *Mother Lode Bank v. GMAC*, 46 Cal. App. 3d 807 (3d Dist. 1975).

Party who came into possession of manufacturer's certificate for mobile home could not thereby become debtor with rights in collateral under UCC § 9-204(1) where the certificate at all times indicated that ownership was transferred from manufacturer to a third party. *Texas State Bank v. Foremost Ins. Co.*, 477 S.W.2d 652 (Tex. Civ. App. 1972), *ref. n.r.e.* (June 28, 1972).

15. —Possession.

Where used car dealer purchased and took possession of three automobiles, but checks given in payment were dishonored, title to automobiles did not pass to used car dealer; thus, creditor of used car dealer could not acquire security interest in automobiles since UCC § 9-204 required debtor to acquire security interest in collateral before security interest could attach. *Gicino v. Credit Thrift of Am.*, No. 3, Inc., 219 Kan. 766, 549 P.2d 870 (1976).

Where debtor acquires possession of collateral under contract, he has acquired such rights in collateral as to allow security interest of his creditor to attach to collateral, regardless of who may be deemed to have title to and ownership of such collateral. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972), *reh'g denied*, 153 Ind. App. 89, 287 N.E.2d 788 (1972).

Delivery of collateral to buyer pursuant to contract of sale satisfied Code § 9-204(1) condition that debtor have "rights" in collateral. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

Mere possession of goods does not constitute "rights in the collateral." *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

16. —What constitutes; creation.

Where creditor and debtor agreed to postpone time of attaching of creditor's security interest in debtor's collateral until event of default should occur, creditor under UCC § 9-204(1) had no security interest in collateral until event of default occurred. *Allegaert v. Chemical Bank*, 454 F. Supp. 341 (E.D.N.Y. 1978), *rev'd on other grounds and remanded*, 657 F.2d 495 (2d Cir. N.Y. 1980).

Rights in collateral as required by UCC § 9-204 for attachment of security interest can be created by estoppel, express or implied. *Avco Delta Corp. Canada v. United States*, 459 F.2d 436 (7th Cir. Ill. 1972).

Statute which specifies that security interest cannot attach until there is agreement that it attach and value is given and debtor has acquired rights and collateral, does not limit rights which debtor must have in such collateral to that of "ownership rights". *Sussen Rubber Co. v. Hertz*, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969).

17. —Particular applications.

In action for defendants' alleged conversion of collateral in which plaintiff had perfected security interest, question of fact existed as to whether third person, who had previously given defendants security interest in same collateral which defendants had perfected, had ever acquired any rights in such collateral as required by UCC § 9-204(1), and existence of such question required denial of plaintiff's motion for partial summary judgment. *National Acceptance Co. of Am. v. Doede*, 78 F.R.D. 333 (W.D. Wis. 1978).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where dealer conveyed mobile home to buyer and assigned security instrument to bank, title vested in buyer and security interest remained in bank and, even though manufacturer's statement of ori-

gin was subsequently issued to dealer, it was not effective to convey any title or interest; since dealer had no rights in collateral, security interest of subsequent creditor who financed dealer's inventory and received manufacturer's statement of origin on mobile home in question, never attached under UCC § 9-204(1). *C.I.T. Fin. Servs. Corp. v. First Nat'l Bank*, 344 So. 2d 125 (Miss. 1977).

Where dealer was authorized to sell mobile home for owner, but manufacturer's certificate of origin was at all times in name of owner and had never been endorsed, dealer never obtained any rights in mobile home from owner to assign to bank, and dealer could not give bank valid security interest in mobile home by falsely stating that he had been authorized to pledge manufacturer's certificate to bank as security for loan. *Texas State Bank v. Foremost Ins. Co.*, 477 S.W.2d 652 (Tex. Civ. App. 1972), *ref. n.r.e* (June 28, 1972).

18. "Value given".

Provision constituting limitation upon rights which seller or its financier might have had, could not and was not intended to confer new rights, and does not provide adequate substitute for "value" which would be necessary as independent basis for separate security interest to attach to goods and be effective against buyer. *First Fin. Co. v. Akathiotis*, 110 Ill. App. 2d 377, 249 N.E.2d 663 (1st Dist. 1969).

19. —Credit.

Under UCC § 9-204(1), "value" was given when claimant first extended credit to bankrupt pursuant to security agreement, and value was later given when claimant assumed bankrupt's indebtedness to third party, thereby creating a purchase money security interest in the property. *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971).

Actual payment of purchase price is not required for attachment of security interest; binding commitment to extend credit meets "value" requirement, where commitment was acted upon, and, actual fulfillment, and time of fulfillment, of obligation to make payment are not determinative as to whether and when "value" was given. *Honea v. Laco Auto*

Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

Value is advanced where a sale is made on credit. *In re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

20. —Other consideration.

Where (1) first corporation obtained financing from Texas bank for purchase of five airplanes, which it intended to resell, and Texas bank, in November, 1972, filed separate chattel mortgage for each plane with Federal Aviation Administration pursuant to federal law, (2) second corporation purchased the five planes from the first corporation and borrowed \$18,000 from Kentucky bank on unsecured note to finance purchase, (3) second corporation, on default in payment for planes, entered into new agreement with first corporation for purchase of only one plane and return of other four, and also agreed not to file bill of sale with Federal Aviation Administration for plane purchased, (4) second corporation gave Kentucky bank, which held second corporation's unsecured note for \$18,000, security agreement which secured repayment of note by encumbering single plane purchased, and bank, in exchange for such security agreement, agreed not to sue on note and filed both security agreement and bill of sale for plane with Federal Aviation Administration, (5) second corporation defaulted in making payments on plane, and first corporation foreclosed on plane and sold it at auction under authority of its November, 1972 security agreement with Texas bank, which security agreement had been assigned to first corporation on its repayment of amount that it owed Texas bank, and (6) second corporation's financier (Kentucky bank) sued first corporation for wrongful interference with its collateral by not respecting bank's lien on repossessed plane, court held (1) that Kentucky bank, under UCC 1-201(44)(b), gave "value" when it took security interest in plane purchased by second corporation to secure bank's preexisting claim against such corporation, (2) that by virtue of UCC § 9-204(1), Uniform Commercial Code does not require that "consideration" in strict-law sense be given as prerequisite for security interest to attach to collateral, (3) that Kentucky bank's security

interest attached at time it gave value and was duly and properly perfected when bank filed instruments with Federal Aviation Administration, (4) that first corporation, under UCC § 1-201(37), had no valid security interest in plane that it repossessed and sold, since first corporation, by discharge of obligation underlying its security interest, had extinguished such security interest, and (5) that first corporation's foreclosure on, and sale of, plane was wrongful and in derogation of rights of plaintiff Kentucky bank, which held valid security interest in plane. *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir. 1978).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. *Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc.*, 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Where for each of three loans, there was value given, there was written agreement between lender and debtor, there was collateral, and debtor had rights in collateral, there was attached security interest in each of loans. *In re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

21. Miscellaneous.

Security interests based on trust receipts attached when the agreements were made, value was given, and the debtor received possession of the collateral, and the security interests were perfected when they attached. *In re United Thrift Stores, Inc.*, 242 F. Supp. 714 (D.N.J. 1965), *aff'd*, 363 F.2d 11 (3d Cir. N.J. 1966).

B. After-Acquired Property.

22. In general.

Fact that security agreement provided that retail store maintained security interest in all merchandise charged to account, even though operating as future advances and after acquired property clause, did not invalidate store's purchase money security interest in merchandise. *In re Moody*, 62 B.R. 282 (Bankr. N.D. Miss. 1986).

Security agreement which provided for security interest in specified items of household furniture and for security interest in "all additions and accessions" to such furniture did not apply, under UCC § 9-204(4)(b), to all of debtor's after-acquired furniture and household furnishings, since proper interpretation of phrase "additions and accessions," when read in context of security agreement and secured interest in specified items of household furniture, was that it only applied to "accessions"—that is, articles later required and physically attached to items of furniture listed as collateral in security agreement. *Anderson v. Southern Dist. Co.*, 582 F.2d 883 (4th Cir. N.C. 1978).

There is nothing in the Uniform Commercial Code which limits security interests in after-acquired property to the debtor's equity in that property. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

As a result of the enactment in Arizona of UCC § 9-204(3), dealing with after-acquired collateral, the validity of an after-acquired property clause in a security agreement is no longer open to question. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

By virtue of the provision of subsection (3) of the instant section that "a security agreement may provide that collateral whenever acquired shall secure all obligations covered by the security agreement" after-acquired property may become subject to a security agreement when such property is delivered to the debtor. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

23. Bankruptcy as affecting.

For "perfection" purposes under Florida law secured party's lien on after-acquired goods arose at time financing statement was filed, and transfer of such goods must be deemed as having occurred on that date for purposes of bankruptcy statute's provision as to preferential transfers subject to avoidance. *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327 (N.D. Fla. 1972), *aff'd*, 486 F.2d 1401 (5th Cir. Fla. 1973).

For purposes of the Bankruptcy Act, an agreement securing a loan to a debtor giving the creditor a security interest in after-acquired inventory items of the debtor is by virtue of § 9-204(3) of the instant chapter considered to give the creditor a lien in the after-acquired items as of the time of the execution of the security agreement, which lien is superior to subsequently acquired liens of simple contract creditors and where the agreement was executed more than 4 months prior to the bankruptcy of the debtor, the security transaction did not constitute a preference as to items of inventory acquired within the 4-month period. The same result was reached alternatively under § 9-108 on the ground that the transfer of items of inventory as acquired would be considered to have been made for new value rather than as security for an antecedent debt, and hence no preference would result. *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

24. Conditional sale as affecting.

The title of a conditional vendor to removable fixtures installed upon realty is superior to the lien of a prior mortgage containing the standard "after-acquired" property clause, but a conditional vendor is bound to refrain from wilfully impairing the security of a real estate mortgagee and if, without the consent of the mortgagee, he removes equipment subject to the mortgage, he should be required to account to the mortgagee for its fair value, and if the equipment which was replaced without the mortgagee's consent was serviceable and of some value, the priorities may appropriately be reversed to the extent of the impairment of the mortgagee's security. *Blancob Constr. Corp. v.* 246

Beaumont Equity, Inc., 23 A.D.2d 413 (1st Dep't 1965).

An unrecorded "conditional sales contract note" covering furniture, furnishings and carpeting furnished to a non-profit corporation created only an unperfected security interest, and an encumbrance created by a prior deed of trust containing an after-acquired property provision was superior to the rights created by such note. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

The rights of a creditor in after-acquired property under a security agreement, conferred by § 9-204(3) of the instant chapter are not affected, by virtue of § 9-202, by the fact, in and of itself, that the after-acquired property is delivered to the debtor under a conditional sales agreement by which title is retained by the seller. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

25. "Floating lien".

The "floating-lien" theory that all subsequently acquired property comes under the earlier security instrument is approved by UCC § 9-204(3). *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Where security agreement entered into between finance company and truck dealer to secure payment of all "floor-plan" advances made to dealer defined collateral as "new and used trucks" which were "to be purchased for inventory," and where such agreement assigned as security the "collateral" and "all proceeds thereof," a continuing relation was contemplated in which the finance company's lien extended to the collateral, as it might exist from time to time, until the indebtedness was satisfied. This is exactly what UCC § 9-204(3) intended. The section validates a security interest in the debtor's existing and future assets, even though the debtor has the right to use or dispose of collateral without being required to account for proceeds or to substitute new collateral. In expressly validating a "floating lien," UCC § 9-204(3) merely recognizes an existing state of things. *Frankel v. Associates Fin. Servs. Co.*, 281 Md. 172, 377 A.2d 1166 (1977).

UCC § 9-204(3) recognizes validity of "floating lien" which arises whenever the

parties agree, as UCC § 9-204(3) permits, that collateral, whenever acquired, shall secure all obligations covered by the security agreement. To create a “floating lien,” the security agreement need not specifically employ the phrase “after-acquired property” or its equivalent, since the court will interpret the agreement in light of trade custom and commercial purpose. *Frankel v. Associates Fin. Servs. Co.*, 281 Md. 172, 377 A.2d 1166 (1977).

Under UCC § 9-204(5), a “floating lien” security agreement will be effective according to its own terms, but only if those terms or the course of dealing of the parties evidence that the real intent of the parties was that their subsequent transactions be covered by terms of security agreement; in instant case there was nothing to show that parties ever intended that their security agreement would apply to future contingent liability on executory contracts between parties which were not similar and not directly related to transaction set forth in original security agreement. *John Miller Supply Co. v. Western State Bank*, 55 Wis. 2d 385, 199 N.W.2d 161 (1972).

26. Intent.

Security agreement which provided for security interest in specified items of household furniture and for security interest in “all additions and accessions” to such furniture did not apply, under UCC § 9-204(4)(b), to all of debtor’s after-acquired furniture and household furnishings, since proper interpretation of phrase “additions and accessions,” when read in context of security agreement and secured interest in specified items of household furniture, was that it only applied to “accessions”—that is, articles later acquired and physically attached to items of furniture listed as collateral in security agreement. *Anderson v. Southern Dist. Co.*, 582 F.2d 883 (4th Cir. N.C. 1978).

Future advance clauses found in two security agreements and financing statements did not apply to subsequent purchases from secured party made by debtor on open account where it was not intention of debtor and secured party for later purchases to be secured by future advance clauses in security agreements, in that parties treated each as separate and dis-

tinct agreement, and each was for specific nonrecurring purposes which was not related in any way to later inventory purchases. *Kimbell Foods, Inc. v. Republic Nat’l Bank*, 401 F. Supp. 316 (N.D. Tex. 1975), rev’d on other grounds, 557 F.2d 491 (5th Cir. Tex. 1977), reh’g denied, 564 F.2d 97 (5th Cir. Tex. 1977).

In considering whether a security agreement covers particular collateral, the debtor’s intent must be judged by the language of the security agreement and not by possible inferences from the surrounding circumstances. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

27. Language creating coverage.

Security agreement which provided for security interest in specified items of household furniture and for security interest in “all additions and accessions” to such furniture did not apply, under UCC § 9-204(4)(b), to all of debtor’s after-acquired furniture and household furnishings, since proper interpretation of phrase “additions and accessions,” when read in context of security agreement and secured interest in specified items of household furniture, was that it only applied to “accessions”—that is, articles later acquired and physically attached to items of furniture listed as collateral in security agreement. *Anderson v. Southern Dist. Co.*, 582 F.2d 883 (4th Cir. N.C. 1978).

Although the Uniform Commercial Code does not require both a financing statement and a security agreement, there is no reason why a financing statement cannot serve as a security agreement, at least when it is accompanied by a note. The purpose of a financing statement is simply to give notice to the world that designated parties have entered into a secured transaction that covers described collateral; the details of the transaction however, must be learned from the parties. For example, if after-acquired property is to be included as collateral, the security agreement is where this matter should be covered. In other words, under UCC § 9-204(3), the debtor’s intent to create a security interest in after-acquired property must be ascertained from, and judged by, the language of the security agreement and not the language of the

financing statement. *Drysdale v. Cornerstone Bank*, 562 S.W.2d 182 (Mo. Ct. App. 1978).

Provision in furniture installment-sale contract which provided that seller would have purchase-money security interest in both furniture purchased by buyer and also "all after-acquired property in substitution therefor" until buyer had made all payments due under contract was too broad and violated Illinois version of UCC § 9-204(2), which restricts creditor's right in after-acquired property to property acquired by debtor within ten days of creditor's giving value. *Aronson Furn. Co. v. Johnson*, 47 Ill. App. 3d 648, 365 N.E.2d 61 (1st Dist. 1977).

"Dragnet" clause of chattel mortgage agreement encompassed contemporaneously made real estate bond and mortgage and therefore also covered the debt arising from the default on foreclosure of the real estate mortgage. *In re Riss Tanning Corp.*, 468 F.2d 1211 (2d Cir. N.Y. 1972).

"Dragnet" clause of chattel mortgage agreement stating that equipment was security for note "as well as for payment of any other obligation or liability due or to become due whether now existing or hereafter arising" encompassed contemporaneously made real estate bond and mortgage and therefore also covered debt arising from default on foreclosure of that mortgage. *In re Riss Tanning Corp.*, 468 F.2d 1211 (2d Cir. N.Y. 1972).

Where bank had possession of stock pledged as collateral for loans made to decedent's son and prior course of dealing between parties including signed hypothecation agreement form provided ample evidence of agreement that stock would serve as collateral for continuing advances by bank to son, bank had enforceable security interest in stock, despite absence of adequate description of stock in stock assignment and hypothecation agreement. *Beyer's Estate v. Bank of Pa.*, 449 Pa. 24, 295 A.2d 280 (1972).

Assignee of all receivables "now or hereafter" owned is assignee of accounts receivable and as such, under UCC § 9-204, has continuing security interest in present and future (court's emphasis) inventory of his debtor, and his lien prevails over a subsequent judgment creditor who

levied prior to the secured party taking possession of the collateral. *O'Hara & Shaver, Inc. v. Empire Bituminous Prods., Inc.*, 67 Misc. 2d 47 (1971).

Possibly, between the parties to the security agreement, the ambiguous provision to the effect that it creates a security for "any and all liabilities... now existing or hereafter arising" might be found, on parol testimony, to mean that it does apply to subsequent deliveries, but so to find under UCC § 9-204(3) where third-party claimants to the fund were involved would be to stretch its language beyond what is reasonable and beyond what is just. *Rusch Factors, Inc. v. Passport Fashion, Ltd.*, 67 Misc. 2d 3 (1971), *aff'd*, 38 A.D.2d 690, 327 N.Y.S.2d 536 (1st Dep't 1971), appeal denied, 30 N.Y.2d 482 (1972).

A provision of the security agreement relating to inventory that it applies "to all collateral of the kind which is subject of this agreement which debtor may acquire at any time" manifests a clear intent to include future inventory of the debtor. *Thomson v. O.M. Scott Credit Corp.*, 28 Pa. D. & C.2d 85 (1962).

Accounts receivable which the creditor agreed in 1957 to assign to the bank as they became due from the United States government fell within the clause covering "all future accounts receivable submitted" contained in a 1955 financing statement filed by the bank, so that the interest of the bank, as the secured party, was superior to that of the receiver in bankruptcy in a 1958 proceeding, and any funds which had been placed in the hands of the bank pursuant to the assignment did not have to be turned over to the receiver. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

28. Priority.

In an action by a seller of air conditioning equipment against a bank which held a perfected security interest on all after-acquired property belonging to the bankrupt purchaser of the air conditioning equipment, the trial court erred in granting possession of the air conditioning units to the seller where the security agreement held by the bank specifically included after-acquired property, including air conditioning units, and such secu-

rity agreement had been perfected by being filed with the chancery clerk's office and in the office of the secretary of state of the State of Mississippi four months prior to the sale of the units to the purchaser; nor did the seller attain the status of a purchase money secured party where the conditional sales contracts covering the air conditioning units had not been filed until more than a year after the sale was completed, thereby ignoring the requirements of § 75-9-312(4) requiring perfection of the security interest at the time the debtor received possession of the collateral or within ten days. *Peoples Bank & Trust Co. v. Comfort Eng'g Co.*, 408 So. 2d 1190 (Miss. 1982).

In action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached under UCC § 9-204(1) and § 9-204(2)(a) at exactly the same time (when crops were planted), and where, because debtor owed installments to plaintiff within six months of planting his crops, defendant's security interest was not entitled to priority under UCC § 9-312(2) over plaintiff's security interest, plaintiff's security interest, which was perfected by filing of financial statement before defendant perfected his security interest by filing such a statement, was entitled under UCC § 9-312(5)(a) to priority over security interest of defendant. *United States v. Minster Farmers Coop. Exch., Inc.*, 430 F. Supp. 566 (N.D. Ohio 1977).

Subsections (1) and (3) of UCC § 9-204, when read together, make it clear that security interest that arises by virtue of after-acquired property clause has equal status with security interest in collateral in which debtor has rights at time value is given under security agreement. *Valley Nat'l Bank v. Flagstaff Dairy*, 116 Ariz. 513, 570 P.2d 200 (Ct. App. 1977).

Although it had been orally agreed between buyer and seller that delivery of machine was not to be made except upon payment, such agreement as to delivery and payment was modified or waived by seller, and buyer became credit buyer, when manufacturer mistakenly shipped machine to buyer and seller forwarded invoice requiring payment "net in 30

days"; consequently, buyer acquired rights in machine and seller's unperfected purchase money security interest became subordinate to lender's security interest in buyer's after-acquired "equipment." *Galleon Indus., Inc. v. Lewyn Mach. Co.*, 50 Ala. App. 334, 279 So. 2d 137 (Civ. App. 1973), cert. denied, 291 Ala. 779, 279 So. 2d 142 (1973).

Where a security agreement has already been executed, a security interest in subsequent accounts receivable attaches as soon as the accounts become due, and prevails over a judgment lien thereafter obtained. *Space-Tronics, Inc. v. IBM Corp.*, 3 U.C.C. Rep. Serv. 902 (1966, NY Sup).

29. 10-day rule generally.

Where secured party's interest in "replacement of collateral" was limited to property "of like kind acquired within 10 days" of the loan, security agreement did not violate UCC § 9-204(4)(b), since under that section, after-acquired property can be subject of security interest if debtor acquires interest in such property within ten days after secured party gives value to debtor. *Dzadovsky v. Lyons Ford Sales, Inc.*, 452 F. Supp. 606 (W.D. Pa. 1978), aff'd, 593 F.2d 538 (3d Cir. Pa. 1979).

Statement in lender's consumer-credit disclosure form which merely stated that security agreement between lender and borrower would secure "future or other indebtedness" and cover "after-acquired property" did not inform borrower that under UCC § 9-204(4)(b), lender's security interest could not attach under such after-acquired property clause as to consumer goods, other than accessions, unless such goods were acquired within 10 days after secured party gave value. *Casillas v. Government Employees Credit Union*, 570 S.W.2d 57 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Dec. 13, 1978).

Ten day limitation on attachment of after-acquired consumer goods under UCC § 9-204(4)(b) is applicable to security agreement even though the security document does not state the ten day limitation. *Freeman v. Decatur Loan & Fin. Corp.*, 140 Ga. App. 682, 231 S.E.2d 409 (1976).

Where (1) creditor's loan disclosure statement stated that transaction was se-

cured by security agreement covering all of debtor's household goods, appliances, and furniture then located on or about debtor's residential address, and (2) financing statement filed by creditor stated that it covered household goods, furniture, and appliances "now owned or hereafter acquired" by debtor, court held (1) that under UCC § 9-204(4)(b), which prevents a security interest from attaching to consumer goods acquired more than ten days after the transaction, financing statement was not enforceable as to debtor's after-acquired property, and (2) creditor's contention that financing statement conferred no rights on parties did not lessen his attempt to mislead and confuse debtor in violation of Federal Consumer Credit Protection Act and Regulation Z. *Ballew v. Associates Fin. Servs. Co.*, 450 F. Supp. 253 (D. Neb. 1976).

Under UCC § 9-204(4)(b), security interest can be acquired (as additional security) in after-acquired consumer goods only if such goods are accessions or if borrower obtains rights to such goods within ten days after secured party gives value. *Murphy v. Beneficial Fin. Co.*, 443 F. Supp. 463 (S.D. Ohio 1976).

Automobile was "consumer goods" within meaning of UCC § 9-204(4), limiting security interests in after-acquired consumer goods to those in which debtor acquired rights within 10 days after secured party gives value. *In re Dunne*, 407 F. Supp. 308 (D.R.I. 1976).

30. Truth-In-Lending Act.

In an action by a lender to recover the balance due on a loan following the debtors' default, a counterclaim by the debtors based on a violation of the Truth in Lending Act (US Code, tit 15, § 1601 et seq.) in that the disclosure statement described the security interest as covering the debtors' automobile as well as all "household consumer goods of every kind now owned or hereafter acquired" by the debtors, was not time barred since although subdivision (e) of section 1640 of title 15 of the United States Code provides that such an action against a lender is to be commenced within one year from the date of the occurrence of the violation and the action was commenced more than three years after the loan was made, the coun-

terclaim arose out of the transaction sued upon and is not untimely. *Public Loan Co. v. Hyde*, 47 N.Y.2d 182, 390 N.E.2d 1162 (1979).

In consolidated actions brought under Truth In Lending Act, court held (1) that loan documents which failed to indicate state law limitations under UCC § 9-204(2) on creditors' security interests in after-acquired property did not comply with disclosure requirements of Truth In Lending Act and Regulation Z, and (2) that security agreement of one creditor, which explicitly excepted "after-acquired consumer goods acquired more than 10 days after the date hereof," did comply with UCC § 9-204(2) and thus was not invalid under Truth In Lending Act and Regulation Z. *Basham v. Finance Am. Corp.*, 583 F.2d 918 (7th Cir. Ill. 1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 89 (1979), cert. denied, 444 U.S. 825, 100 S. Ct. 47, 62 L. Ed. 2d 32 (1979).

Borrower was entitled to recover \$100, plus costs and attorney's fees, in action under federal Truth-in-Lending Act for lender's failure to disclose its acquisition of security interest in after-acquired consumer goods where (1) lender actually acquired security interest under UCC § 9-204(4)(b), (2) failed to disclose it, and (3) such failure was apparent on face of loan disclosure document. *Wilson v. Allied Loans, Inc.*, 448 F. Supp. 1020 (D.C.S.C. 1978).

Disclosure statement of lender which advised borrower that after-acquired property would be covered by security interest but failed to advise borrower of limitation of security interest on after-acquired consumer goods pursuant to UCC § 9-204(4)(b), violated Truth in Lending Act regulation. *Pollock v. General Fin. Corp.*, 535 F.2d 295 (5th Cir. Ga. 1976), reh'g denied, 552 F.2d 1142 (5th Cir. Ga. 1977), cert. denied, 434 U.S. 891, 98 S. Ct. 265, 54 L. Ed. 2d 176 (1977).

31. —Violation of 10-day rule.

A disclosure statement made by a lender which describes the security interest as covering all "household consumer goods of every kind now owned or hereafter acquired" is in direct conflict with subdivision (2) of section 9-204 of the

Uniform Commercial Code, which limits the security interest a creditor may take in consumer goods to those acquired within 10 days after the creditor gives value, and is also in violation of Regulation Z (12 CFR 226.8 [b] [5]), which was adopted pursuant to the provisions of the Truth in Lending Act (US Code, tit 15, § 1601 et seq.) and requires a clear identification of the property to which the security interest relates; accordingly, inasmuch as the security interest was not properly and clearly set forth because it was unlawfully overstated and overbroad, the lender is liable to the debtor in an amount of twice the finance charge imposed, pursuant to subdivision (a) of section 1640 of title 15 of the United States Code. *Public Loan Co. v. Hyde*, 47 N.Y.2d 182, 390 N.E.2d 1162 (1979).

Statement in lender's consumer credit disclosure form which merely stated that security agreement between lender and borrower would secure "future or other indebtedness" and cover "after-acquired property" did not inform borrower that under UCC § 9-204(4)(b), lender's security interest could not attach under such after-acquired property clause as to consumer goods, other than accessions, unless such goods were acquired within 10 days after secured party gave value. *Casillas v. Government Employees Credit Union*, 570 S.W.2d 57 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Dec. 13, 1978).

Lender's disclosure statement, which provided that security agreement would secure future indebtedness and would "cover after-acquired property," violated federal Truth-in-Lending Act and Regulation Z by not complying with requirement that lender must explain ten-day limitation of UCC § 9-204(4)(b) in order that borrower will be informed that any consumer goods that he may acquire within ten days of loan transaction are subject to lender's security interest, and that any consumer goods acquired after that date are not subject to such interest. *Garza v. Allied Fin. Co.*, 566 S.W.2d 57 (Tex. Civ. App. 1978).

A failure on the part of a lender to disclose that the scope of its security interest in after-acquired consumer goods is limited to those acquired within 10 days

after the lender gives value (Uniform Commercial Code, § 9-204, subd [2]) constitutes an affirmative misstatement of the scope of the lender's security interest, is violative of the Federal Truth in Lending Act (US Code, tit 15, § 1639) and a regulation promulgated thereunder, and renders the lender liable to the debtors for the statutory penalty of twice the finance charge (US Code, tit 15, § 1640); however, while section 353 of the New York Banking Law incorporates that Federal act and regulation to the extent of requiring the disclosure of all items required to be disclosed thereby, the improper disclosure statement here is not so blatant or substantial a violation of that section as to justify imposition of the drastic sanctions provided for in section 358 of the Banking Law, pursuant to which one who violates section 353 thereof is guilty of a misdemeanor and the underlying debt is totally invalidated. *Public Loan Co. v. Hyde*, 63 A.D.2d 193 (3d Dep't 1978), aff'd, 47 N.Y.2d 182, 417 N.Y.S.2d 238, 390 N.E.2d 1162 (1979).

In action by borrower under federal Truth-in-Lending Act (15 USCA § 1601 et seq.), defendant creditor's disclosure statement and security agreement violated both Truth-in-Lending Act and UCC § 9-204(4)(b), dealing with attachment of security interest under after-acquired property clause to consumer goods given as additional security where debtor acquires rights in such goods within ten days after secured party gives value, since creditor's security agreement claimed interest beyond scope permitted by UCC § 9-204(4)(b) by failing to allow for ten-day limitation that statute provided for. *Conrad v. Beneficial Fin. Co. of New York*, 91 Misc. 2d 643 (1977).

Creditor's disclosure statement violated federal Truth-In-Lending Act and Regulation Z where it failed to inform debtor (1) that under state law (South Carolina UCC § 9-204(4)(b)), potential security interest could have attached to all similar consumer goods acquired within 10 days of date when value was given by creditor, and (2) that under state law (South Carolina UCC § 9-204(5)), any future advance given as extension of credit by creditor to debtor could also be covered by same col-

lateral. *Jones v. Allied Loans, Inc.*, 447 F. Supp. 1121 (D.C.S.C. 1977).

In action for violation of federal Truth-in-Lending Act (15 USCA §§ 1601 et seq.), description in loan disclosure statement of property of debtors in which creditor held security interest under Uniform Commercial Code, which described such property as "all goods...hereafter located at debtor's address," was misleading, since under UCC § 9-204(4)(b), creditor can only obtain interest in after-acquired goods that debtor acquires within ten days of secured party's giving value, but loan disclosure statement did not inform debtors of such ten-day limitation. *Cadmus v. Commercial Credit Plan, Inc.*, 437 F. Supp. 1018 (D. Del. 1977).

Provision in lender's disclosure statement, executed in connection with loan made to debtor for purchase of home, which recited that documents executed in connection with such transaction covered "all after-acquired property" of debtor, but which did not explain 10-day limitation set by UCC § 9-204(4)(b) on consumer goods and other personal property of debtor that could be subjected to lender's security interest, conflicted with UCC § 9-204(4)(b), federal Truth-in-Lending Act (15 USCA § 1601 et seq.), and regulations promulgated under such act because such provision inaccurately described property securing loan and was misleading and confusing to borrowers. *Bartlett v. Commercial Fed. Sav. & Loan Ass'n*, 433 F. Supp. 284 (D. Neb. 1977).

32. —Not violative of 10-day rule.

The failure of plaintiff finance company to state in its combined promissory note and disclosure statement that under State law the security interest covering defendants' after-acquired household consumer goods was limited to those goods acquired by defendants within 10 days after the loans were made (Uniform Commercial Code, § 9-204, subd [4], par [b]) did not violate the disclosure requirements of the Federal Truth in Lending Act (US Code, tit 15, § 1639, subd [a], par [8]) and the regulations thereunder which only require that the fact that after-acquired property will be subject to a security interest "be clearly set forth in conjunction

with the description or identification of the type of security interest held, retained or acquired" (12 CFR 226.8 [b] [5]). The note and disclosure statement did reveal that a security interest was sought in after-acquired household goods. The omission to specify the limitation of the security interest in defendants' consumer goods to those acquired within 10 days is not significant enough to justify the total forfeiture of the principal and interest of the loans which would result under sections 353 and 358 of the Banking Law for a failure to properly disclose under the Federal act. A note and disclosure statement need not incorporate all portions of the State law in order not to run afoul of the Federal Truth in Lending Act which only requires a description of the security interest to be retained and clear identification of the property to which it relates. The Federal act gives the consumer the right to know the terms on which a lender will extend him credit, but does not give the consumer the right to know all the creditor's rights and duties under State law. *Interlakes Fin. Corp. v. Payne*, 92 Misc. 2d 770 (1978).

33. Miscellaneous.

Where debtor moved location of business to another county after creditor had properly filed financing statement in county where business was originally located, after-acquired property clause contained in creditor's security agreement pursuant to UCC § 9-204(3) did not apply to collateral delivered to debtor's new place of business, since perfection, i.e., creditor's giving of value and debtor's acquiring rights in collateral, did not occur until after debtor had moved. In re *Hammons* (1980, CA5 Miss.) 514 F2d 399, 6 BCD 187, 22 CBC 728, 28 UCCRS 857 (applying Mississippi Law).

After-acquired property clause in security agreement creates valid security interest in crops which are planted and become such within one year after the security agreement is executed, where rights in crops are acquired by debtor in ordinary course of his business. *Overland Nat'l Bank v. Aurora Coop. Elevator Co.*, 184 Neb. 843, 172 N.W.2d 786 (1969).

C. Future Advances.

34. In general.

Fact that security agreement provided that retail store maintained security interest in all merchandise charged to account, even though operating as future advances and after acquired property clause, did not invalidate store's purchase money security interest in merchandise. *In re Moody*, 62 B.R. 282 (Bankr. N.D. Miss. 1986).

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what

had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Where (1) first creditor made its first loan to common debtor and secured it with financing statement and chattel mortgage that were filed on June 6, 1973, (2) second creditor made loan to debtor and filed its security agreement on same collateral on March 8, 1974, (3) third creditor made loan to debtor and filed its security agreement on April 26, 1974, (4) fourth creditor, in September, 1973, leased premises to debtor and assigned lease to second creditor in February, 1974, as security, but such lease was never recorded, (5) first creditor subsequently made additional loans to debtor which were secured by instruments filed on March 21, 1975 and March 1, 1976, (6) debtor fully paid off its first note to first creditor, but such creditor did not release of record its previously filed chattel mortgage, and (7) first creditor testified that although debtor had paid off its first note in full, debtor was never out of debt to first creditor after date on which such creditor's first loan was made, court held (1) that first creditor's subsequent loans to debtor were advances, that its recorded chattel mortgage contained a future-advances clause permitted by UCC § 9-204(5), and that it thus had first priority in the collateral, (2) that since first creditor's chattel mortgage had never been released of record, the other creditors could have discovered first creditor's claim, but apparently chose not to do so, (3) that debtor's payment of first creditor's first note did not terminate such creditor's continuing security interest, especially since such creditor's filed chattel mortgage contained a future-advances clause and debtor was thereafter never out of debt to first creditor, and (4) that fourth creditor's claim that his lease, although not recorded, amounted to landlord's lien that gave him priority over second creditor had no merit. *Associated Bus. Inv. Corp. v. First Nat'l Bank*, 264 Ark. 611, 573 S.W.2d 328 (1978).

Provisions of statute permitting any mortgage or other instrument given for purpose of creating lien on real or personal property to include future advances, but requiring that instrument state maximum principal amount of unpaid future advances that may be secured at any one time, was inconsistent with legislative intent embodied in provisions of UCC and were superseded by UCC § 9-204. *Mason v. Avdoyan*, 299 So. 2d 603 (Fla. App. 1974).

35. Intent.

Future advance clauses found in two security agreements and financing statements did not apply to subsequent purchases from secured party made by debtor on open account where it was not intention of debtor and secured party for later purchases to be secured by future advance clauses in security agreements, in that parties treated each as separate and distinct agreement, and each was for specific nonrecurring purposes which was not related in any way to later inventory purchases. *Kimbell Foods, Inc. v. Republic Nat'l Bank*, 401 F. Supp. 316 (N.D. Tex. 1975), rev'd on other grounds, 557 F.2d 491 (5th Cir. Tex. 1977), reh'g denied, 564 F.2d 97 (5th Cir. Tex. 1977).

Intent of parties was not to extinguish original obligation but merely to extend time of payment or, at most, to substitute new notes as conditional payment of old, dependent on payment of new notes to extinguish original obligation; consequently issue of new notes was not synonymous with making of future advances under UCC § 9-204(5). *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 455 F.2d 141 (4th Cir. Md. 1970).

36. Language creating coverage.

In suit to obtain possession of five dump trucks or judgment against possessor thereof for amount of unpaid indebtedness secured by trucks, where evidence showed (1) that debtor had bought trucks under installment sales contract and security agreement dated June 30, 1973, and that security interest in trucks had been perfected by filing of financing statement, (2) that debtor had also bought other equipment from different seller under installment sales contract and security agree-

ment dated July 24, 1973, (3) that both installment sales contracts and security agreements were assigned to plaintiff shortly after sales contracts had been entered into, (4) that debtor, who had been making payments to plaintiff, defaulted on both contracts before his death, (5) that plaintiff claimed that after security interest had attached to trucks, debtor wrongfully transferred them from Michigan to defendant in Oklahoma, and (6) that plaintiff, on basis of future-advances clause in first security agreement, claimed right to satisfy debtor's unpaid indebtedness under both security agreements from trucks, court held (1) that future-advances clauses are valid under UCC § 9-204(5), (2) that although it is no longer necessary, as between original lender and original debtor, for future advances to be of same class as primary obligation, future-advances clause in plaintiff's first security agreement was not sufficient to permit collateral (trucks) for first agreement to secure indebtedness incurred under debtor's second sales contract, since language in future-advances clause in first security agreement was not clear as to whether such collateral was intended to secure all of debtor's future debts arising as among debtor, assignor, and assignee (plaintiff) only, or whether collateral was intended to secure all debts that debtor might end up owing to assignor or assignee without regard to whom such debts were originally owed. *Thorp Sales Corp. v. Dolese Bros. Co.*, 453 F. Supp. 196 (W.D. Okla. 1978).

Although UCC § 9-204(5) provides that obligations covered by security agreement may include future advances, in order for security interest to subject collateral to future advances, security agreement must clearly indicate, either directly or indirectly, that obligation covered includes future advances. Hence, language in security agreements executed by buyer in favor of seller of trucks, which provided that title to purchased collateral (trucks) should not pass to buyer until "all other indebtedness from buyer to secured party" (in addition to purchase payments and related charges on trucks) had been fully paid was not sufficient to include future advances in obligation under such security agreements. *Texas Kenworth Co. v.*

First Nat'l Bank, 564 P.2d 222 (Okla. 1977).

Provision in two security agreements, executed to secure payment of two notes evidencing loans made by bank to debtor, that collateral secured all existing and subsequently incurred indebtedness of debtor to bank was valid and effective under UCC § 9-201 and § 9-204(5) to continue bank's lien on collateral, even after debtor paid the two notes, where debtor had incurred other indebtedness to bank which remained unpaid. *National Bank v. Shaad*, 60 A.D.2d 774 (4th Dep't 1977).

Using future-advance clauses and using after-acquired property clauses in the original security agreement are not the only means by which perfected security interests can be obtained in subsequently contracted obligations or in goods the debtor may later come to own, since there is nothing exclusive about UCC § 9-204(3, 5). *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

37. Novation distinguished.

Execution of new note renewing evidence of old indebtedness and extending time of payment was not "future advance or other value" which Code required to be specifically included within terms of security agreement. In *re Cantrill Constr. Co.*, 418 F.2d 705 (6th Cir. Ky. 1969), cert. denied, 397 U.S. 990, 90 S. Ct. 1124, 25 L. Ed. 2d 398 (1970).

38. Particular applications.

Where seller sold four trucks to buyer in 1969, obtained execution of four separate security agreements (one for each truck) for purchase price of trucks and related costs, and perfected four separate security interests in trucks by filing, but such security agreements did not specifically subject collateral (the four trucks) to any future advances that might be made by seller to buyer; where bank in 1971 made loan to purchaser of such trucks, took security interest in all equipment then or thereafter owned by purchaser, and also perfected such security interest by filing; where purchaser's obligation to pay seller purchase price of trucks and related costs had been satisfied when bank took posses-

sion of trucks and sold them; and where proceeds of such sale were not sufficient to make whole either bank or seller, (1) bank's security agreement entitled it to priority over all collateral (trucks) and proceeds of sale thereof, since seller's prior security agreements did not clearly secure certain future advances-allowed by UCC § 9-204(5)-that were later made by seller to purchaser and all of purchaser's debts to seller, except for such future advances, had been satisfied and seller's security agreements were no longer in effect when bank took possession of proceeds of sale of collateral; (2) bank's priority over collateral and proceeds of sale thereof were not affected by fact that seller's filed financing statements, which were filed when its 1969 security agreements were made, were never released by seller, since UCC § 9-406 does not impose duty to file such release in absence of written demand therefor by debtor to creditor under UCC § 9-404; and (3) bank, at time it took possession of trucks, was entitled to possession by virtue of its security interest and thus was not guilty of conversion of proceeds of sale. *Texas Kenworth Co. v. First Nat'l Bank*, 564 P.2d 222 (Okla. 1977).

Where first creditor in 1968 sold equipment to debtor, sale was financed by purchase money mortgage, and financing statement was filed, where in 1969 second creditor made advance to debtor, took same equipment as collateral and filed financing statement, and where in 1970 first creditor sold additional equipment to debtor, executed new purchase money mortgage and new note which included balance due on all indebtedness, and filed new financing statement, under UCC § 9-312(5)(a) security interest of first creditor with respect to equipment covered by 1968 security agreement took priority over second creditor's security interest notwithstanding first creditor's 1968 security agreement contained no provision to cover future advances as was specifically authorized by UCC § 9-204(5). *Index Store Fixture Co. v. Farmers' Trust Co.*, 536 S.W.2d 902 (Mo. Ct. App. 1976).

D. Particular Collateral.

39. Accounts receivable.

Code permits security agreement to create lien in after-acquired accounts receiv-

able; security interest in grain company's accounts "now or hereafter received" was security interest in accounts receivable as whole and not in individual components. *Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir. Ind. 1969), cert. denied, 396 U.S. 827, 90 S. Ct. 75, 24 L. Ed. 2d 78 (1969), but see, *In re Coppie*, 728 F.2d 951 (7th Cir. Ind. 1984), but see, *Redmond v. Mendenhall*, 107 B.R. 318 (D. Kan. 1989).

Bank held valid assignment of debtor's future accounts receivable as security for loan made by bank to debtor, since UCC § 9-204(3) states that security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by security agreement. *Valley Nat'l Bank v. Flagstaff Dairy*, 116 Ariz. 513, 570 P.2d 200 (Ct. App. 1977).

Although bank's financing statement on debtor's accounts receivable was on file with secretary of state at time subsequent creditor agreed to finance same accounts, bank would be estopped from asserting priority of its security interest where, upon being questioned, bank president stated that bank had security interest in furniture, fixtures, equipment and inventory of debtor corporation, but did not inform subsequent creditor of any security interest in accounts receivable held by bank. *Manson State Bank v. Diamond*, 227 N.W.2d 195 (Iowa 1975).

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

40. Inventory.

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-

402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Under UCC § 9-204(3) when a security interest in inventory (court's italics) of a business, after-acquired inventory is automatically covered by the agreement unless it is clearly set out that only certain items of inventory are to be covered. In re *Nickerson & Nickerson, Inc.*, 329 F. Supp. 93 (D. Neb. 1971), aff'd, 452 F.2d 56 (8th Cir. Neb. 1971).

Where the validity of a security agreement which secures both present and future advances and covers both existing and after-acquired inventory is not controverted, the security interest attached to such inventory. *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821 (1967).

41. —Attachment, perfection, priority.

Where boats and hulls in possession of boat builder were subject to mechanic's liens of builder's employees for labor performed in boats' construction, (1) builder's ownership of boats was subject to such liens, (2) builder's equity was boats, hulls, or value thereof, as reduced by employees' liens, and (3) lien of lender bank, which under UCC § 9-204(4)(b) was holder of perfected security interest in after-acquired property incorporated into boats

and hulls, attached only to builder's equity in boats and hulls and was inferior to mechanic's liens of builder's employees. *Smith v. Atlantic Boat Bldr. Co.*, 356 So. 2d 359 (Fla. App. 1978).

Where bank had security interest in furniture dealer's after-acquired inventory, dealer acquired certain inventory from manufacturer, and manufacturer provided delivery of items in its own trucks, at its own risk, and all sales were for cash on delivery, dealer acquired rights in collateral when it was delivered and, thus, bank's security interest attached at that point under UCC § 9-204(1), was perfected upon delivery under UCC § 9-303, and took priority over statutory landlord's lien which attached at same time. *National Inv. Trust v. First Nat'l Bank*, 88 N.M. 514, 543 P.2d 482 (1975).

While, by virtue of §§ 9-303(1) and 9-204(1), a security interest in after-acquired inventory items may not be fully perfected until it attaches to items as and when they are acquired by the debtor, nevertheless § 9-204(3) recognizes that a lien in such inventory items can be created by a security agreement and such a lien, if filing requirements are complied with, is superior to a subsequently acquired contract creditor's lien or other third party claims except those of buyers in ordinary course of business under § 9-307(1) and holders of perfected purchase money security interests under § 9-312(3). *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

42. —Particular applications.

Glass, plywood, locks, hinges, pulls, felt, and other materials supplied by one company to another company to be manufactured into finished gun cabinets, which were then to be sold at reduced price to company furnishing materials, were "inventory" of manufacturer under UCC § 9-109(4) and thus subject to attachment, under UCC § 9-204(1), of perfected security interests of two banks in manufacturer's present and after-acquired inventory under security agreement executed by manufacturer in favor of banks to secure loans made by banks. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

In action by inventory financier to recover damages from manufacturer for conversion of ten mobile homes sold by manufacturer on consignment basis to dealer, as to which homes inventory financier claimed perfected security interest, (1) manufacturer's claim that inventory financier's lien never attached to homes, which claim was based on "after-acquired property" nature of financier's lien and financier's alleged failure to advance funds to dealer with specific reference to such homes, could not be sustained, since under UCC § 9-204(3), validity of after-acquired property clauses in security agreements was no longer open to questions; (2) in present case, first two requirements of UCC § 9-204(1)—namely, that there must be agreement that security interest attach and secured party must give value—were clearly met by dealer's signing security agreement in favor of inventory financier and financier's advancing substantial funds pursuant to such agreement; (3) third requirement of UCC § 9-204(1)—namely, that debtor must acquire rights in collateral—was satisfied when dealer obtained possession of homes pursuant to consignment agreement between dealer and manufacturer; (4) under UCC § 2-326(2), dealing with goods held on sale or return, homes were subject to claims of dealer's creditors while in dealer's possession; and (5) under UCC § 9-303(1), inventory financier's security interest, which had been properly filed, became perfected when it attached to homes at time dealer obtained possession thereof. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Where debtor was corporation that operated retail clothing store, where secured party acquired perfected purchase money security interest in debtor's inventory including its proceeds and after-acquired property, where debtor corporation merged with other corporations, each operating retail clothing outlets, and, finally, where surviving corporation entered into assignment for benefit of creditors: (1) secured party had valid security interest in after-acquired inventory of debtor, notwithstanding that at time of assignment for benefit of creditors surviving corporation did not have in its possession any

inventory purchased from secured party by surviving corporation for any of its constituent corporations; (2) after-acquired property clause extended to property acquired by surviving corporation after merger; and (3) financing statement on file at time of assignment for benefit of creditors was not deficient though it did not contain name of debtor-assignor. However, secured party did not have security interest in the proceeds of inventory from other stores not covered by security agreement. *Inter Mt. Ass'n of Credit Men v. Villager, Inc.*, 527 P.2d 664 (Utah 1974).

43. Livestock.

Creditor with after-acquired security interest in livestock owned by debtor, a feedlot operator, took priority over third person who claimed ownership of certain cattle located in debtor's feedlot pens where, under UCC § 9-204, there was a valid security agreement, where creditor had given value and where evidence supported finding that cattle were purchased by debtor for himself rather than as agent for third person. *Poteet v. Winter Garden Prod. Credit Ass'n*, 546 S.W.2d 650 (Tex. Civ. App. 1977), *ref. n.r.e.* (June 1, 1977).

Where security agreement covering herd of cattle described collateral as "84 Holstein Cows and 14 Holstein Heifers, 1 to 2 ½ years of age," description of collateral was sufficient under UCC § 9-110 to create enforceable security interest under UCC § 9-203(1)(b); furthermore, where security agreement provided that debtors had "right to sell cows that ceased to be productive or to otherwise cull the herd; but they shall at all times retain a sufficient number of replacement heifers, or otherwise provide satisfactory replacements, to maintain a herd not smaller than that being now purchased" and that "Buyers agree to grant t[sic] Sellers a lien upon said property [cattle] and upon the replacements therefor..." use of term "replacement" was adequate to create security interest in after-acquired property (i.e., cattle) under UCC § 9-204(3). *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

Cattle delivered by seller to cattle company did not become subject to security agreement between bank and cattle company under its after-acquired property

clause where cattle company received cattle in question under agreement with seller that title would pass only upon payment and where, furthermore, cattle were received by employee of cattle company as agent for seller and were branded with brand later registered in name of seller. *Zions First Nat'l Bank v. First Sec. Bank*, 534 P.2d 900 (Utah 1975).

Cattle which feed lot owner purchased for account of another could not be considered after-acquired property coming within security agreements executed by feed lot owner and secured party. *National Livestock Credit Corp. v. First State Bank*, 503 P.2d 1283 (Okla. Ct. App. 1972).

An after-acquired property clause in a security agreement through which certain cows were sold was valid. *Erb v. Stoner*, 19 Pa. D. & C.2d 25 (1959).

44. Proceeds.

In dispute over proceeds of tractors subject to both "after-acquired property" clause under UCC § 9-204(3) and purchase money security interest, purchase money security interest was subordinated to other security interest where, under UCC § 9-312(4), debtor possessed equipment for more than 10 days prior to filing of financing statement. *James Talcott, Inc. v. Associates Capital Co.*, 70 Ohio Op. 2d 295, 491 F.2d 879 (6th Cir. Ohio 1974).

In dispute between executrix of debtor's estate and creditor claiming security interest in bank account, security agreement identifying collateral as all existing and after-acquired contract rights and all proceeds of all such contract rights and accounts owned by debtor was sufficient to create security interest in after-acquired property under UCC § 9-204, and sums collected by executrix on accounts and contract rights of decedent were clearly "proceeds" under UCC § 9-306(1). *Barnett Bank v. Fletcher*, 290 So. 2d 533 (Fla. App. 1974).

In action between competing secured creditors over proceeds from debtor's crops, UCC § 9-402 requirement that collateral be adequately described was met where subsequent lender had actual knowledge of prior claim of security interest in debtor's property and crops; under UCC § 9-204(4), providing that no security interest attaches under after-ac-

quired property clause to crops which become such more than one year after security agreement is executed, subsequent lender had burden of proving that crops in question were not planted until more than one year after original security agreement was executed. *First Sec. Bank v. Wright*, 521 P.2d 563 (Utah 1974).

45. Replacement goods.

In action by borrower against lender under Truth in Lending Act, security agreement clause granting security interest in "All of the consumer goods of every kind now owned or hereafter acquired by Debtors in replacement of said consumer goods and now owned or hereafter located in or about the place of residence of the Debtors' at the address shown above," was misleading in that under UCC § 9-204(2), a security interest may attach only to replacement goods acquired within 10 days after secured party gives value. *Tinsman v. Moline Beneficial Fin. Co.*, 531 F.2d 815, 32 A.L.R. Fed. 854 (7th Cir. Ill. 1976).

Clause in security agreement which purported to give secured party after acquired security interest in all consumer goods of every kind then owned or thereafter acquired by debtors in replacement thereof went beyond UCC § 9-204 which requires all security interests to attach on consumer goods only after debtors have acquired rights in goods and given such rights as additional security within 10 days after secured party has given value. *Sneed v. Beneficial Fin. Co.*, 410 F. Supp. 1135 (D. Haw. 1976).

III. Pre-Uniform Commercial Code Decisions.

Where a trustee covered all agricultural products growing or to be grown during

the year on certain lands and also all of mules, horses, and cattle, which at that particular time consisted of two head of mules, one head of horses, and three head of cattle, this description was sufficient to impose a valid lien on the above property. *Albritton v. State*, 52 So. 2d 608 (Miss. 1951).

Under the statute, a description of property in a deed of trust as being all crops of cotton, corn, truck and other agricultural products growing or to be grown by the grantor or by any one for him, and produced during the year 1938 upon a specifically described tract of land, and also the grantor's mules, horses, and cattle, together with all farming tools, implements, and machinery, and also all increase thereof and additions thereto within 12 months from the date of execution, was valid. *Eiland v. Castle*, 186 Miss. 513, 191 So. 492 (1939).

The statute is limited to chattels of the character described or limited as to locality, owned at the time of the execution of the instrument, and its provisions could not aid an indictment charging a defendant with obtaining money by false pretenses by mortgaging previously mortgaged property, where the property in question consisted of a crop to be grown by the defendant. *State v. Collins*, 186 Miss. 448, 191 So. 126 (1939).

This statute in providing that chattel mortgage on after-acquired property is valid does not limit validity to property acquired within twelve months, since the statute does not grant a right to execute mortgages on after-acquired property, but provides only when such mortgages shall be valid as to creditors, and that mortgagors may pay secured debts before maturity thereof. *Prentiss Mercantile Co. v. Thurman*, 173 Miss. 6, 161 So. 746 (1935).

RESEARCH REFERENCES

ALR. Priority as between seller or conditional seller of personalty and claimant under after-acquired property clause of mortgage or other instrument. 86 A.L.R.2d 1152.

Construction and effect of "future advances" clauses under UCC Article 9. 90 A.L.R.4th 859.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 231-266.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:201 et seq (validity of security agreement and rights of parties thereto; When interest attaches).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured

Transactions, §§ 253:3421 et seq (attachment of security interest; after-acquired property; future advances).

CJS. 79 C.J.S., Secured Transactions §§ 82 et seq.

Ten day limitation on attachment of after-acquired consumer goods under

UCC § 9-204(4)(b) is applicable to security agreement even though the security document does not state the ten day limitation. *Freeman v. Decatur Loan & Fin. Corp.*, 140 Ga. App. 682, 231 S.E.2d 409 (1976).

§ 75-9-205. Use or disposition of collateral permissible.

(a) A security interest is not invalid or fraudulent against creditors solely because:

(1) The debtor has the right or ability to:

(A) Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;

(B) Collect, compromise, enforce, or otherwise deal with collateral;

(C) Accept the return of collateral or make repossessions; or

(D) Use, commingle, or dispose of proceeds; or

(2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) This section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Commingled goods, see § 75-9-336.

Alienability of debtor's rights, see § 75-9-401.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-205.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-205.

6. In general.

In bank's suit to have security interest in used-car dealer's inventory declared to be first and prior security interest as against interests of three persons to whom such inventory was transferred, where evidence showed that bank's security interest was perfected by filing, covered future advances, and gave bank security interest in all present and after-acquired

property and proceeds; that one transferee took trust receipts and titles to specific vehicles to secure loans made to dealer and entered into security agreement granting security interest in vehicles identified in trust receipts, which agreement was filed after filing of bank's security agreement; that second transferee took trust receipts as security for loans made to dealer, but did not enter into security agreement with dealer; and that third transferee's purchase for resale of over half of dealer's inventory may have been financed by first transferee, (1) under UCC § 9-110, description of collateral in bank's security agreement included all of dealer's inventory and proceeds therefrom; (2) under UCC § 9-205, alleged failure of bank to supervise dealer's inventory properly could not constitute basis for denying equitable relief to bank; (3) security interest of first transferee was junior

to bank's security interest because it was perfected after perfection of bank's interest; (4) security interest of second transferee was junior to bank's security interest because it was never perfected; and (5) security interest of third transferee was also subject to bank's security interest because such transferee was bulk purchaser under UCC § 1-201(9) and not buyer in ordinary course of business under UCC § 9-307(1). *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977).

In prosecution for crime of moving and transferring inventory with intent to hinder enforcement of security interest, defendant's transfer of one business to location of his other business and his commingling of inventories of his two businesses constituted legal behavior in absence of contrary stipulation in security instrument, since, inter alia, under UCC § 9-205, security interest was not invalidated or made fraudulent against creditors by commingling of inventories and UCC § 9-315 protected any security interest in commingled inventory. *Sowards v. State*, 137 Ga. App. 423, 224 S.E.2d 85 (1976).

Tobacco supplier that retained continuing security interest in all of tobacco dealer's current and future inventory of supplier's products, accounts receivable arising from sale of such products and all products and proceeds of foregoing, did not lose its security interest in proceeds from sale of its products by permitting such proceeds to be co-mingled with other funds in wholesaler's corporate bank account; hence, supplier was entitled to recover such proceeds from bank where bank transferred such funds from wholesaler's account to itself outside ordinary course of business. *Brown & Williamson Tobacco Corp. v. First Nat'l Bank*, 504 F.2d 998 (7th Cir. Ill. 1974).

Where automobile dealer financed his used car inventory through floor plan arrangement with finance company and, under side arrangement with second automobile dealer, satisfied his obligations to finance company by assigning used cars to second dealer, who would then issue its note to finance company in release of first dealer's note, but such cars were frequently left on first dealer's lot and sold by

him on commission basis, and where first automobile dealer then entered into agreement with credit corporation to finance his new car inventory and executed security agreement in favor of credit corporation covering his inventory, including, inter alia, his used car inventory: (1) Credit corporation acquired perfected security interest in first dealer's used car inventory; (2) security interest was not waived by clause in security agreement providing that private sale of chattel to dealer in such types of chattels for amount originally paid by dealer for such chattel or at lesser fair price would be "commercially reasonable disposition thereof," nor was it waived by fact that credit corporation treated dealer's used car business as completely separate from his new car business which credit corporation was financing; (3) sales of used cars to second dealer, made at arm's length, without fraud and at fair price, were sales in ordinary course of business, and, hence, second dealer acquired title to such cars free of security interest. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

Rule that dealer having authority to expose floor-plan cars for sale in ordinary course of business binds his mortgagee to deliver title to any car so sold, when payment is made to dealer and whether or not dealer remits proceeds to his mortgagee, unless buyer knows or should have known of financing arrangements, or unless contract of sale can and does expressly limit warranty of title given, was not affected or undermined by subsequent adoption of article 9 of UCC; although in adopting Code, Ohio general assembly modified language of UCC to provide that § 9-307 does not apply in motor vehicle title cases, and though UCC § 9-205 repudiates, as against creditors, common law rule which held floating liens void as matter of law, protection afforded purchaser in ordinary course of business was expanded to provide absolute protection in cases other than purchases of motor vehicles; however, it cannot from this be concluded that buyer of vehicle is left unprotected, only that Commercial Code,

as adopted, fails to speak to issue and recourse must be had to common law and other statutory law. *Levin v. Nielsen*, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973).

Under UCC, parties to security agreement were free to decide who should have right to possession of collateral. *American Honda Motor Co. v. United States*, 363 F. Supp. 988 (S.D.N.Y. 1973).

Flexible method of financing whereby lenders make loans secured by revolving pool of collateral, dispensing with assignment of individual receivables and using special cash collateral accounts for receiving and disbursing proceeds therefrom, is authorized by Code abrogation of "debtor dominion" rule of *Benedict v. Ratner*. *Grain Merchants of Indiana, Inc. v. Union*

Bank & Sav. Co., 408 F.2d 209 (7th Cir. Ind. 1969), cert. denied, 396 U.S. 827, 90 S. Ct. 75, 24 L. Ed. 2d 78 (1969), but see, *In re Coppie*, 728 F.2d 951 (7th Cir. Ind. 1984), but see, *Redmond v. Mendenhall*, 107 B.R. 318 (D. Kan. 1989).

The perfected security interest of a retail finance corporation who purchased a credit agreement signed by a "buyer in the ordinary course of business" from an automobile dealer had priority over the perfected interests of a bank which furnished floor plan financing to finance the dealer's acquisition and holding of motor vehicles for use and resale in the course of the dealer's business. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 510-513.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:171, 9:172 (use or disposition of collateral without accounting).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3451 et seq (permissible use or disposition of collateral).

29 Am. Jur. Proof of Facts 2d 711, Se-

cured Transactions — Waiver of Security Interest.

CJS. 79 C.J.S., Secured Transactions §§ 88 et seq.

72 C.J.S., Pledges §§ 16-18.

Law Reviews. The recent erosion of the secured creditor's rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-206. Security interest arising in purchase or delivery of financial asset.

(a) A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) The security interest described in subsection (a) secures the person's obligation to pay for the financial asset.

(c) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

(A) In the ordinary course of business is transferred by delivery with any necessary endorsement or assignment; and

(B) Is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) The security interest described in subsection (c) secures the obligation to make payment for the delivery.

SOURCES: Former 1972 Code § 75-9-206 [Codes, 1942, § 41A:9-206; Laws, 1966, ch. 316, § 9-206, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-403 by Laws, 2001, ch. 495, § 1. Present § 75-9-206 was derived from former 1972 Code § 75-9-116 [Laws, 1996, ch. 468, § 60, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

SUBPART 2.

RIGHTS AND DUTIES.

SEC.

- 75-9-207. Rights and duties of secured party having possession or control of collateral.
- 75-9-208. Additional duties of secured party having control of collateral.
- 75-9-209. Duties of secured party if account debtor has been notified of assignment.
- 75-9-210. Request for accounting; request regarding list of collateral or statement of account.

§ 75-9-207. Rights and duties of secured party having possession or control of collateral.

(a) Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Except as otherwise provided in subsection (d), if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

(A) For the purpose of preserving the collateral or its value;

(B) As permitted by an order of a court having competent jurisdiction;

or

(C) Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under Section 75-9-104, 75-9-105, 75-9-106, or 75-9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) does not apply unless the secured party is entitled under an agreement:

(A) To charge back uncollected collateral; or

(B) Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) do not apply.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Variation of provisions of this Code by agreement, see § 75-1-102(3).

Transfer and negotiation of commercial paper, see §§ 75-3-201 et seq.

Right to compel indorsement of negotiable document of title, see § 75-7-506.

Right to compel indorsement of investment security, see § 75-8-307.

Right of the debtor to use collateral, see § 75-9-205.

Perfection without filing, see § 75-9-313.

Perfection by control, see § 75-9-314.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-207.

6. In general; duty of care.
7. Disclaimer of duty.
8. Duty to preserve value.
9. —Duty of government as to treasury bills.
10. Duty to record security interest.
11. Proof of negligence or bad faith.
12. Wrongful conversion.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-207.

6. In general; duty of care.

In an action for a deficiency judgment on a secured note, in which the maker of

the note claimed a setoff for profits earned by guarantors of the note while the collateral was in their possession and used by them prior to the sale, the trial court erred in refusing to allow the jury to consider evidence of profits earned by the guarantors through their use of the collateral, since, once they had paid the note and received the collateral securing it, they were subject to all the rights and obligations of the creditor with regard to disposition of the collateral, pursuant to § 75-9-504(5), and since § 75-9-207(2)(c) obligated them to apply any net profits received from their possession of the collateral to reduce the secured obligation. *Murray v. Payne*, 437 So. 2d 47, 45 A.L.R.4th 379 (Miss. 1983).

Failure to exercise right to convert debentures into stock, or failure to present note for payment with result that solvent

indorser is thus released from liability, falls within second sentence of UCC § 9-207(1), dealing with duty of secured party to use reasonable care to preserve collateral in his possession. However, a bank which holds stock as collateral for a loan is under no duty to the borrower to sell the stock if it declines in value. In such a case, it is the borrower who makes the investment decision to purchase the stock; the lender merely accepts it as collateral for the loan and does not undertake to act as an investment adviser. *Capos v. Mid-America Nat'l Bank*, 581 F.2d 676 (7th Cir. Ill. 1978).

The rule of reasonable care set forth in UCC § 9-207(1) with regard to the custody and preservation of collateral in the secured party's possession is confined to physical care of the chattel, regardless of whether it is an object, such as a horse or piece of jewelry, or a negotiable instrument or document of title. The rule does not apply to mere diminution in the market value of securities. *Capos v. Mid-America Nat'l Bank*, 581 F.2d 676 (7th Cir. Ill. 1978).

Bank failed to exercise reasonable care mandated by UCC § 9-207 when it deliberately delivered note and mortgage to one other than its owner. *Signer v. First Nat'l Bank & Trust Co.*, 455 F.2d 382 (6th Cir. Ky. 1971).

7. Disclaimer of duty.

Even if there was valid agreement exempting secured party's assignee from use of reasonable care in preservation of collateral, where assignee did not respond to assignor's letter indicating that assignor was relying on assignee to record judgment note, assignee was estopped from raising exemption; held, exemption or exculpation clause was not effective as against duty of care imposed by UCC § 9-207(1). *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

A disclaimer of duty of reasonable care toward collateral by secured party is invalid as violative of UCC § 1-102(3). *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

8. Duty to preserve value.

Under UCC §§ 3-201(2), which deals with transfer of security interest in in-

strument, and 9-207(1), which deals with secured party's duty to preserve collateral in his possession, where payee of note executed by defendant assigned such note to bank as collateral security for loan, (1) payee had no right to compromise or settle note, or to take any action that might diminish bank's interest therein, and (2) bank's title thereto, to extent of debt owed to it by payee, was paramount. Moreover, after balance of payee's debt to bank had been paid by note's maker and bank had returned note to payee, note was still valid and outstanding, although maker was entitled to credit thereon for amount that he had paid bank in order to discharge payee's indebtedness to bank. *Vinson v. McCarty*, 413 So. 2d 1026 (Miss. 1982).

The rule of reasonable care set forth in UCC § 9-207(1) with regard to the custody and preservation of collateral in the secured party's possession is confined to physical care of the chattel, regardless of whether it is an object, such as a horse or piece of jewelry, or a negotiable instrument or document of title. The rule does not apply to mere diminution in the market value of securities. *Capos v. Mid-America Nat'l Bank*, 581 F.2d 676 (7th Cir. Ill. 1978).

Failure to exercise right to convert debentures into stock, or failure to present note for payment with result that solvent indorser is thus released from liability, falls within second sentence of UCC § 9-207(1), dealing with duty of secured party to use reasonable care to preserve collateral in his possession. However, a bank which holds stock as collateral for a loan is under no duty to the borrower to sell the stock if it declines in value. In such a case, it is the borrower who makes the investment decision to purchase the stock; the lender merely accepts it as collateral for the loan and does not undertake to act as an investment adviser. *Capos v. Mid-America Nat'l Bank*, 581 F.2d 676 (7th Cir. Ill. 1978).

UCC § 9-207(4) permits a secured party to use or operate the collateral for the purpose of preserving it or its value. However, this section does not give the secured party a right to appropriate the collateral permanently. Essentially, UCC § 9-207(4) reflects the fiduciary obligation

of a creditor to manage and care for the collateral pending judicial or UCC foreclosure. And if a secured party takes possession of collateral and fails to proceed to obtain a valid foreclosure, it so acts at its peril. *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223 (8th Cir. Mo. 1978).

In suit by debtor against creditor for damages for latter's refusal to allow stock constituting collateral for loan to be sold to prevent loss in its value, in which debtor alleged that creditor's refusal violated its duty under UCC § 9-207(1) to use reasonable care in custody and preservation of collateral, court held (1) that debtor's tender of less than total proceeds of proposed sale of the stock justified, as a matter of law, creditor's refusal to release it for sale, and (2) that debtor's demand for release of part of the collateral, even though total proceeds thereof were applied in part payment of the loan, could justifiably be refused unless remaining collateral was of a kind and quality equal or superior to that sold and was also of value sufficient to meet collateral requirements of the loan balance. *Dubman v. North Shore Bank*, 85 Wis. 2d 819, 271 N.W.2d 148 (Ct. App. 1978), *aff'd*, 90 Wis. 2d 226, 279 N.W.2d 455 (1979).

Assuming duty of pledgee of shares of stock to exercise reasonable care to preserve collateral in his possession required him to exercise reasonable care to preserve its value, pledgee's refusal to consent to sale of call options to purchase part of pledged shares within 6 months and 10 days, and to consent to sale of remaining shares, short against box, for amount less than loans secured, did not under circumstances constitute failure to exercise reasonable care to preserve pledged stock. *Hutchison v. Southern Cal. First Nat'l Bank*, 27 Cal. App. 3d 572, 68 A.L.R.3d 645 (4th Dist. 1972).

Within Oklahoma Code section requiring secured party to use reasonable care in preservation of collateral in his possession, "preservation" includes preservation of value. *Reed v. Central Nat'l Bank*, 421 F.2d 113 (10th Cir. Okla. 1970).

A sub-pledgee of negotiable securities is under the duty to exercise reasonable care for the preservation and protection of their value. *Grace v. Sterling, Grace & Co.*, 30 A.D.2d 61 (1st Dep't 1968).

9. —Duty of government as to treasury bills.

Duty of secured party under UCC § 9-207 to protect collateral does not arise until secured party has exercised right to repossess collateral. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

Plaintiffs who had deposited one million dollars in United States treasury bills with clerk of tax court in order to stay assessment and collection of tax deficiency were not entitled to damages or interest on bills after they remained interest-free in treasury for one year following their maturity on theory that implied security agreement existed between parties under UCC § 1-201(3) and (37) and that federal government thus had duty to reinvest bills after their maturity or to notify plaintiffs of such maturity. Even assuming existence of implied security agreement between parties, duty of holder under UCC § 9-207(1) to preserve collateral does not include duty to make collateral produce income, and no decrease in bills' value was even remotely possible. *Cleveland Chair Co. v. United States*, 557 F.2d 244 (Ct. Cl. 1977).

District court did not have jurisdiction to entertain action by taxpayers against United States on theory that United States was liable under UCC § 9-207(1) to taxpayers for interest which they lost on matured treasury notes held by United States as condition of stay of assessment and collection of taxes pending appeal in former case. *Cleveland Chair Co. v. United States*, 526 F.2d 497 (6th Cir. Tenn. 1975).

Where debtor sold vehicles that were subject to security interest to third party, secured party was entitled, on default, to enforce its right of possession against third party; failure of third party to surrender property immediately upon default and demand prevented secured party from using collateral under UCC § 9-207(4) or reselling or leasing it under UCC § 504(1), and third party was liable to secured party for loss of use of property as element of damages. *Long Island Trust Co. v. Porta Aluminum, Inc.*, 49 A.D.2d 579 (2d Dep't 1975).

10. Duty to record security interest.

Although notes which had been guaranteed by individual who subsequently became bankrupt, which were made payable to borrowers from bank, and which were held by bank as collateral security for loans made to borrowers, were not in default when bank claimed its right of set-off against bankrupt under UCC § 9-207(1), insolvency of guarantor triggered bank's privilege, and possibly its duty, not only to file proof of claim in bankruptcy proceedings, but in alternative to assert any available set-off; initial immaturity of bankrupt guarantor's obligation upon collateral notes was not bar to bank's right of set-off. *In re Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

Where purchaser of airplane executed chattel mortgage and promissory note in favor of bank, guarantors executed guarantee and bank failed to record chattel mortgage with federal aviation authority for more than two years, although UCC § 3-606 did not apply, UCC § 9-207 did apply, bank breached its duty to promptly record chattel mortgage, thereby unjustifiably impairing collateral upon which guarantors had right to rely, and consequently guarantor's right of subrogation, and guarantors were properly discharged to extent of value of security lost. *National Bank v. Alford*, 65 Mich. App. 634, 237 N.W.2d 592 (1975).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

An exculpatory clause appearing in a written assignment, which accompanied delivery to a finance company of a conditional sales contract and judgment note, to the effect that the assignor warranted

compliance with all filing and recording requirements and without responsibility on the assignee's part for any omission or invalidity, did not impose liability on the assignor for the assignee's subsequent failure to record the judgment note prior to the makers' disposing of their real property (which recording could not be effected under Pennsylvania law until after the note was in default); the court noting that the letter transmitting the papers to assignee requested the finance company to record the note in the proper county and that at the time the judgment note was in default it was exclusively in the possession of the assignee. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

Under this section, accommodation or co-maker of note was entitled to have secured party take steps necessary to preserve maker's rights under note, including proper filing of chattel mortgage and delivery of certificate of title to proper official for notation of mortgage encumbrance thereon. *Shaffer v. Davidson*, 445 P.2d 13 (Wyo. 1968).

11. Proof of negligence or bad faith.

Pledgee was not responsible for decline in market value of securities pledged to it as collateral for loan absent showing of bad faith or negligent refusal to sell after demand by pledgor. *New Jersey Bank v. Toffler*, 139 N.J. Super. 161, 353 A.2d 116 (App. Div. 1976).

In the absence of proof that secured party failed to use reasonable care in the custody and preservation of a repossessed automobile, and of evidence of a causal connection between unreasonable care and the damaged condition of the vehicle discovered by the buyer when it was restored to him, no liability either in tort or contract attaches to the secured party. *Del Negro v. Worcester County Nat'l Bank*, 26 Mass. App. Dec. 59 (1963).

12. Wrongful conversion.

Failure to return pledged security to pledgor upon satisfaction of indebtedness amounts to wrongful conversion of security for which pledgee is liable. *Signer v. First Nat'l Bank & Trust Co.*, 455 F.2d 382 (6th Cir. Ky. 1971).

Bank was liable for wrongful conversion where it inadvertently released third party's note and mortgage to third party

instead of to its signer-pledgor. *Signer v. First Nat'l Bank & Trust Co.*, 455 F.2d 382 (6th Cir. Ky. 1971).

RESEARCH REFERENCES

ALR. Interest on damages for pledgee's refusal to return pledged property. 36 A.L.R.2d 337.

Purchase by pledgee as subject of pledge. 37 A.L.R.2d 1381.

Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller. 54 A.L.R.2d 1361.

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property. 68 A.L.R.2d 1259.

Duty of pledgee of stocks, bonds, or similar securities to protect their value during period of pledge, under UCC § 9-207. 68 A.L.R.3d 657.

Secured party's duty under UCC § 9-207(2)(c) to reduce secured obligation by increase or profits received from collateral. 45 A.L.R.4th 394.

Am Jur. 1 Am. Jur. 2d, Accession and Confusion §§ 1 et seq.

11 Am. Jur. 2d, Bills and Notes § 939.
68A Am. Jur. 2d, Secured Transactions §§ 524-537.

5A Am. Jur. Pl & Pr Forms (Rev), Chattel Mortgages, Forms 51 et seq. (default; enforcement of security interest).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:251 et seq (collateral in secured party's possession).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3481 et seq (rights and duties when collateral is in possession of secured party).

29 Am. Jur. Proof of Facts 2d 711, Secured Transactions — Waiver of Security Interest.

CJS. 79 C.J.S., Secured Transactions §§ 36, 111 et seq.

15A C.J.S., Confusion of Goods.

72 C.J.S., Pledges §§ 8 et seq.

§ 75-9-208. Additional duties of secured party having control of collateral.

(a) This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under Section 75-9-104(a)(2) shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under Section 75-9-104(a)(3) shall:

(A) Pay the debtor the balance on deposit in the deposit account; or

(B) Transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under Section 75-9-105 shall:

(A) Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under Section 75-8-106(d)(2) or 75-9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; and

(5) A secured party having control of a letter-of-credit right under Section 75-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party.

SOURCES: Former 1972 Code § 75-9-208 [Codes, 1942, § 41A:9-208; Laws, 1966, ch. 316, § 9-208, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-210 by Laws, 2001, ch. 495, § 1. Present § 75-9-208 was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Definitions, see § 75-9-201.

Perfection by control, see § 75-9-314.

Disposition of collateral after default, see § 75-9-610.

§ 75-9-209. Duties of secured party if account debtor has been notified of assignment.

(a) Except as otherwise provided in subsection (c), this section applies if:

(1) There is no outstanding secured obligation; and

(2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under Section 75-9-406(a) an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Contents of financing statement, see § 75-9-502.
Indication of collateral in financing statement, see § 75-9-504.

§ 75-9-210. Request for accounting; request regarding list of collateral or statement of account.

(a) In this section:

(1) "Request" means a record of a type described in paragraph (2), (3), or (4).

(2) "Request for an accounting" means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) "Request regarding a list of collateral" means a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) "Request regarding a statement of account" means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within fourteen (14) days after receipt:

(1) In the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within fourteen (14) days after receipt.

(d) A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) A debtor is entitled without charge to one (1) response to a request under this section during any six-month period. The secured party may require payment of a charge not exceeding Twenty-five Dollars (\$25.00) for each additional response.

SOURCES: Derived from former 1972 Code § 75-9-208 [Codes, 1942, § 41A:9-208; Laws, 1966, ch. 316, § 9-208, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Contents of financing statement, see § 75-9-502.
Indication of collateral in financing statement, see § 75-9-504.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-208.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-208.

6. In general.

UCC § 9-208(1) does not require debtor to make written request for balance due before he can redeem collateral. *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880 (Ala. 1978).

In action by secured party against purchaser of collateral for sum allegedly owed on account secured by collateral, secured party could be precluded from recovery, notwithstanding purchaser did not request debtor pursuant to UCC § 9-208 to obtain statement of account from secured party, if secured party verified directly to purchaser amount due on account without including contested sum. *Ayers v. Yancey Bros. Co.*, 141 Ga. App. 358, 233 S.E.2d 471 (1977).

Use of nominee was legitimate under Uniform Commercial Code; thus, recording of financing statement was entirely proper despite fact that principal creditor's nominee, rather than principal creditor, was named as secured party. In re *Cushman Bakery*, 526 F.2d 23 (1st Cir.

Me. 1975), cert. denied, 425 U.S. 937, 96 S. Ct. 1670, 48 L. Ed. 2d 178 (1976).

Secured party was not obligated under UCC § 9-208 to give statement of balance due where debtor made oral, rather than written, request for statement; secured party. *Rainey v. Ford Motor Credit Co.*, 294 Ala. 139, 313 So. 2d 179 (1975).

Where a debtor moved inventory subject to security interest from one store to another, security interest's perfected status remained intact without necessity of refileing. *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327 (N.D. Fla. 1972), aff'd, 486 F.2d 1401 (5th Cir. Fla. 1973).

A subsequent creditor of the debtor may protect himself by requiring the debtor, as a condition to granting a loan, to obtain disclosure by existing creditors to the debtor the status of existing financing arrangements with him. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

Section provides procedure under which secured party, at debtor's request, may be required to make disclosure. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

A creditor's failure to enforce the provisions of a security agreement requiring payments within a specified time was not a constructive fraud upon other creditors, since the other creditors were put on notice by the financing statement and under this section could have obtained from the creditor a detailed statement of amounts

due. Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 13 Pa. D. & C.2d 119 (1957).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 547-549.
6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:331, 9:332 (request for statement of account or list of collateral).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, § 253:3491 (request for statement of account or list of collateral).

PART 3.

PERFECTION AND PRIORITY.

Subpart 1.	Law Governing Perfection and Priority.....	75-9-301
Subpart 2.	Perfection.....	75-9-308
Subpart 3.	Priority.....	75-9-317
Subpart 4.	Rights of Bank.....	75-9-340

Editor’s Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under “Judicial Decisions” were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

SUBPART 1.

LAW GOVERNING PERFECTION AND PRIORITY.

SEC.	
75-9-301.	Law governing perfection and priority of security interests.
75-9-302.	Law governing perfection and priority of agricultural liens.
75-9-303.	Law governing perfection and priority of security interests in goods covered by a certificate of title.
75-9-304.	Law governing perfection and priority of security interests in deposit accounts.
75-9-305.	Law governing perfection and priority of security interests in investment property.
75-9-306.	Law governing perfection and priority of security interests in letter-of-credit rights.
75-9-307.	Location of debtor.

§ 75-9-301. Law governing perfection and priority of security interests.

Except as otherwise provided in Sections 75-9-303 through 75-9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) Perfection of a security interest in the goods by filing a fixture filing;

(B) Perfection of a security interest in timber to be cut; and

(C) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

SOURCES: Former 1972 Code § 75-9-301 [Codes, 1942, § 41A:9-301; Laws, 1966, ch. 316, § 9-301; Laws, 1977, ch. 452, § 14; Laws, 1986, ch. 343, § 1; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996] is now found in comparable provisions enacted at §§ 75-9-102, 75-9-317, and 75-9-323 by Laws, 2001, ch. 495, § 1. Present § 75-9-301 was derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Security interests under motor vehicle titles law, see §§ 63-21-1 et seq.

Territorial application of Code, see § 75-1-105.

Scope of this chapter, see § 75-9-109.

Security interests under condominium law, see § 89-9-9.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

6. Generally.
7. Controlling law.
8. —Conflict of laws.
9. —Agreement of parties.
10. Perfection.
11. —Filing in debtor's principal place of business.
12. Security interest in accounts and contract rights.

13. Miscellaneous.

B. Mobile Goods.

14. In general.
15. Incoming goods subject to security interest.
16. Four month rule.
17. —Priority.
18. —Lapse of perfection.
19. —Particular examples.
20. Thirty day rule.
21. Movement of property covered by certificate of title.
22. —Title to nontitle state.

- 23. —Nontitle to title state.
- 24. —Between title states.
- 25. —Between nontitle states.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

6. Generally.

This section deals with accounts, contract rights and equipment relating to another state, and incoming goods already subject to a security interest. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

The institution of distraint proceedings obviously does not fall within the intentment of this section. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

7. Controlling law.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a

healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (applying New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Recognition of the title certificate issued in the state of origin and perfection of the security interest noted thereon can continue only as long as the title certificate of the state of origin is the only certificate. Once a new certificate is issued in a second state, it becomes, under UCC § 9-

103(4), “the jurisdiction which issued the certificate,” and its law governs the perfection of a security interest. The underlying rationale of UCC § 9-103(4) is that there shall be only one title certificate for an automobile, which is that originally issued if it is still in existence. However, once a second certificate of title has been issued by a second state, it is the law of the second state which determines whether a perfected security interest exists in the vehicle, and the creditor must comply with the law of the second state in order to perfect his security interest. In *re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

The exclusiveness of the Vehicle Code registration and transfer requirements for perfection of security interests in automobiles is provided for under the Uniform Commercial Code § 9103(4). *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28 (4th Dist. 1968).

In a case where the issue was to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity or perfection of the security interest were not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

In a case where the issue is as to whether a buyer was in default under a contract of sale so as to give the seller a right to repossess the article sold, and where there is no issue as to the validity or perfection of a security interest, the question as to which law is to be applied to the transaction is governed by § 1-105(1) of the instant chapter and not by subsection (2) of the instant section. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

8. —Conflict of laws.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either

the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In *re Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Large earth-moving trucks unquestionably belong in classification of "road building equipment", "construction machinery", "automotive equipment", or all these classifications; held, where it is conceded that debtor has chief place of business in Colorado, law of that state, including law on conflicts, must govern with respect to conflicting claims to trucks taken as trade-in by dealer in connection with sale of other construction equipment to buyer in good faith. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969) (applying Colorado law).

If chief place of business of debtor is not in this state, law, including conflict-of-law

rules, of jurisdiction where such chief place of business is located governs perfection of security interest and possibility and effect of proper filing with regard to construction machinery. *GECC v. Western Crane & Rigging Co.*, 184 Neb. 212, 166 N.W.2d 409 (1969).

By adopting Illinois law, contract adopted Illinois conflicts rule of law, so that validity of security interest in goods under contract was to be determined by Indiana law, where goods were taken into Indiana within 30 days of attachment of security interest and where parties understood that property would be kept in Indiana. In *re Kokomo Times Publishing & Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968).

Where it had not adopted the Uniform Trust Receipts Act, the State of Georgia would not be bound to accept the procedural aspects of the Tennessee Act relative to recordation. *Chattanooga Dist. Corp. v. West*, 219 F. Supp. 140 (N.D. Ala. 1963) (applying Georgia law).

9. —Agreement of parties.

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in question, the law of the state of the domicil or place of business of the contracting party in question is controlling. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

10. Perfection.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of ex-

press provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978).

Secured party who had perfected security interest on property in South Dakota, but who did not file and perfect his interest in Iowa within four-month period after goods were transported to Iowa, had junior interest to buyer for value who purchased goods within four-month period, but who had no knowledge or notice of security interest, after lapse of four months without perfection of security interest in Iowa. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974) (citing annotation; applying Iowa law).

Plaintiff had properly filed security agreement perfecting security interest; defendant later perfected security interest by taking possession pursuant to agreement giving defendant right to use machine at issue until completion of work; held, plaintiff was entitled to machine when purchaser filed petition for arrangement under Bankruptcy Act while machine was in defendant's possession. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970) (applying New Jersey law).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

11. —Filing in debtor's principal place of business.

In conversion action to determine priority of security interests in bulldozer and right to proceeds from its sale, where (1) bulldozer was sold in Michigan to Michigan buyer which gave seller an Indiana address, (2) buyer at time of sale was authorized to do business in Indiana and was mainly engaged in developing Indiana property, (3) seller assigned its security agreement listing bulldozer as collateral to plaintiff, and plaintiff filed financing statement with Indiana secretary of state, (4) defendant thereafter obtained security interest in bulldozer under security agreement with buyer, who listed it as collateral for loan from defendant, and filed financing statement with Michigan secretary of state, and (5) plaintiff then filed financing statement in Michigan after defendant's filing, court held (1) that Indiana was buyer's "chief place of business" under UCC § 9-103(2), (2) that Indiana therefore was proper place to file financing statement to perfect security interest in bulldozer, and (3) that since only plaintiff had perfected its security interest in Indiana, judgment was properly entered in plaintiff's favor. *Associates Fin. Servs. Co. v. First Nat'l Bank*, 82 Mich. App. 495, 266 N.W.2d 490 (1978).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973) (applying Kansas law).

The mobility of tractors, normally used in more than one jurisdiction, makes filing in debtor's principal place of business necessary under UCC § 9-103(2) in order to perfect security interest therein, and bank which had not so filed could not prevail over tractor buyer's judgment creditor who levied against tractors in possession of buyer. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Where New Jersey was chief place of business of debtor which had entered into security agreement as to traxcavator, a heavy construction machine, rights of parties were governed by New Jersey law. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970).

12. Security interest in accounts and contract rights.

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

13. Miscellaneous.

Since Illinois vehicle code provided exclusive means of perfecting and giving notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

Transaction between contractor and surety for completion of public improvement project following contractor's default was not intended to have effect as security. *Aetna Cas. & Sur. Co. v. Perrotta*, 62 Misc. 2d 252 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

B. Mobile Goods.

14. In general.

Industrial equipment may not be characterized as mobile goods within meaning of Code § 9-103(2). In re *Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969) (applying Pennsylvania law).

15. Incoming goods subject to security interest.

A security interest in a house trailer perfected in Virginia before the trailer was moved to Oklahoma was effective in the latter state under subsec. (3). *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

An assignee of a conditional sales agreement made in New York is protected as against a purchaser of the security in Pennsylvania for a period of four months provided that the security interest was perfected in New York before the security was brought into Pennsylvania. *Casterline v. GMAC*, 195 Pa. Super. 344, 171 A.2d 813 (1961).

16. Four month rule.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-

retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Where (1) Pennsylvania seller sold boat to Pennsylvania buyer and delivered it to buyer in Maryland, (2) secured party, which had financed purchase of boat by conditional sales contract, perfected its security interest in boat by filing financing statement in Pennsylvania (3) buyer resold boat to third person in Maryland, (4) seller, as representative of secured party, thereafter came to Maryland, took possession of boat, and returned it to seller's premises in Pennsylvania, and (5) second buyer brought replevin action to recover

possession of boat, court held (1) that under UCC § 9-103(3), secured party's security interest in boat, which had been perfected under Pennsylvania law, was also perfected for four months under Maryland law, (2) that after such four-month period had run, secured party's failure to file financing statement in Maryland caused its security interest to become unperfected, and (3) that under UCC § 9-301(1)(c), such unperfected interest was subordinate to rights of second buyer, who was buyer not in ordinary course of business who gave value and received delivery of the collateral without knowledge of security interest therein and before such interest was reperfected in Maryland. *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980 (1978).

The majority of courts which have considered the question have concluded that UCC § 9-103(4) does not apply to all security interests, but only to those which attach after the certificate of title is issued. It may be argued that the statute, as thus interpreted, permits a person in possession of personal property to defraud an innocent purchaser. But it must be kept in mind that the legislature, in adopting the Uniform Commercial Code, sought to strike a balance between the interests of the prior lienholder and those of a subsequent, good-faith purchaser or creditor. In order to afford some protection to the party with the prior interest, he is given, under UCC § 9-103(3), a period of four months in which to perfect his interest in this state. After that, his priority is lost until he perfects the interest. If this protection is given, a prospective purchaser or creditor has the burden of making sure that the property has been located in this state for more than four months. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977).

One who takes title to incoming auto subject to security interest of assignee of conditional vendor during four months from time auto entered jurisdiction cannot prevail over assignee under UCC § 9-103(3). *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

17. —Priority.

Lien created in Massachusetts enjoyed superiority in New York for period of 4 months from date auto arrived in New York without any further measures being undertaken by conditional vendor's assignee, who sought to recover from New York purchaser, to localize such foreign security interest. *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

Where cattle here in question were transported from Utah to Wyoming within 4 months of their delivery to debtor, under Wyoming Code, creditor's security interest perfected under laws of Utah is superior to any rights of innocent purchasers. *Utah Farm Prod. Credit Ass'n v. Dinner*, 302 F. Supp. 897 (D. Colo. 1969).

18. —Lapse of perfection.

Where holder of security interest in automobile which was perfected under Texas law did not reperfect its security interest within four-month period after automobile was brought into Arizona, interests of persons who purchased automobile during that four-month period were not subject to such security interest. *Arrow Ford, Inc. v. Western Landscape Constr. Co.*, 23 Ariz. App. 281, 532 P.2d 553 (1975).

Goods having been removed directly to New Jersey, failure to file financing statement in that state clearly renders security interest unperfected at end of four months even if court considered security interest to have been originally perfected in Pennsylvania; held, four months' period begins to run whether or not secured party has notice that collateral has been removed to another jurisdiction. *In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969).

19. —Particular examples.

Where (1) plaintiff Farmers Home Administration made loan to Mississippi farmer and properly perfected security interest in Mississippi in all of farmer's livestock, (2) farmer, without knowledge or approval of plaintiff, shipped livestock from Mississippi to Tennessee to be sold, (3) livestock, within four months of their removal to Tennessee, were sold to bona-

fide purchasers by defendant livestock broker, (4) farmer did not apply sale proceeds to plaintiff's loan and defaulted on loan payments, and (5) plaintiff took no action to perfect its security interest in Tennessee, court held (1) that Uniform Commercial Code should be adopted as relevant federal common law in Farmers Home Administration security-interest cases; (2) that if there should be lack of uniformity on particular issue, either because of nonuniform changes in UCC itself or because of differing interpretations of a uniform provision, court would ordinarily follow weight of authority; (3) that in present case, since right of plaintiff to recover in conversion against defendant depended on which of two interpretations should be given to four-months protection rule in UCC § 9-103(3), court would adopt interpretation favored by weight of authority, which is that UCC § 9-103(3) gives secured party four months of "absolute protection" in removal state without necessity of any additional filing in removal state at any time; and (4) that since defendant had sold livestock within four months of their removal to Tennessee, judgment would be entered for plaintiff. *United States v. Burnette-Carter Co.*, 575 F.2d 587 (6th Cir. Tenn. 1978), *cert. denied*, 439 U.S. 996, 99 S. Ct. 596, 58 L. Ed. 2d 669 (1978).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either

the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Perfected purchase money security interest from foreign state is not enforceable in Florida unless perfected within four-month period; this is clear legislative intent under UCC § 9-103(3) despite apparent injustice to holder of purchase money security interest who fails to register lien in Florida after motor vehicle is moved thereto. GECC v. Hollywood Bank & Trust Co., 263 So. 2d 593 (Fla. App. 1972).

The innocent purchaser in New Jersey of an automobile subject to a security interest perfected in New York takes the vehicle subject to the rights of an assignee of the original New York conditional vendor where the transaction in New Jersey

took place within four months after the conditional vendee had removed the automobile to that state, even though the security interest had not then been perfected in New Jersey, for the four month period provided by subsec. (3) is an absolute period of protection of the vendor's security interest. First Nat'l Bank v. Stamper, 93 N.J. Super. 150, 225 A.2d 162 (1966).

A conditional vendor who fails to perfect his security interest within the four-month period provided by subsec. (3) is no longer protected, and a subsequent purchaser of the property for value and without notice of the security interest would take a superior title. First Nat'l Bank v. Stamper, 93 N.J. Super. 150, 225 A.2d 162 (1966).

20. Thirty day rule.

In bankruptcy proceeding involving conflicting interests in car purchased by debtor in Illinois prior to being declared bankrupt in Georgia, where (1) debtor created security interest in vehicle which holder duly perfected under Illinois statute that required such interest to be perfected by noting it on vehicle's certificate of title; (2) debtor at time of purchase informed secured party that debtor would remove vehicle to Georgia within 30 days for purposes other than transportation and debtor did remove it within such time, but secured party did not take any steps to perfect such security interest in Georgia; (3) debtor's trustee in bankruptcy claimed superior interest in vehicle under provision of Georgia certificate-of-title statute which declared that Georgia law would determine validity of out-of-state security interest in vehicle brought into Georgia if parties understood at time interest was created that vehicle would be kept in Georgia and vehicle was brought into Georgia within 30 days thereafter for purposes other than transportation; (4) secured party claimed superior interest in vehicle under another provision of the Georgia certificate-of-title statute which provided that security interest perfected under law of jurisdiction where vehicle was situated when interest attached would continue perfected in Georgia if name of holder of interest was shown on certificate of title issued by such other

jurisdiction; and (5) secured party also contended that in light of Georgia version of UCC § 9-103(3), term "validity of security interest" in statutory provision on which bankruptcy trustee based claim to vehicle in suit was not synonymous with "perfection of security interest," so as to sustain trustee's claim, federal court would certify to Supreme Court of Georgia question whether holder of security interest in vehicle in suit was also required to obtain Georgia certificate of title for such vehicle and to note thereon its security interest in order to protect it against claim of bankruptcy trustee. In re McClintock, 558 F.2d 732 (5th Cir. Ga. 1977), appeal decided, 571 F.2d 317 (5th Cir. Ga. 1978) (certifying question of Georgia law determinative of cause to Supreme Court of Georgia).

21. Movement of property covered by certificate of title.

Where bankrupt, using money borrowed from New York bank, purchased second hand truck in Ohio and acquired clean certificate of title in Ohio, bank's security interest not being noted on title certificate as required by Ohio law, bankrupt registered vehicle in Ohio using title certificate, although bank knew nothing of Ohio registration and title certificate nor of bankrupt's intention to register vehicle there, and although truck was garaged principally in New York, in accordance with UCC § 9-103(4) law of Ohio determined existence of perfected security interest prior to bank's lawful repossession of truck in state of New York and bank, therefore, did not obtain perfected security interest in New York by filing financing statement in New York. In re Osborn, 389 F. Supp. 1137 (N.D.N.Y. 1975) (applying New York law).

Under Virginia UCC, perfection of security interest would be governed by law of jurisdiction which issued certificate of title on mobile home, which in this case was West Virginia. In re Smith, 311 F. Supp. 900 (W.D. Va. 1970), *aff'd*, 437 F.2d 898 (4th Cir. Va. 1971).

UCC § 9-103(4) unequivocally removes application of UCC § 9-103(3) to any personal property covered by a certificate of title issued under a statute of any state which requires indication on a certificate

of title of any security interest as a condition of perfection; in other words, one who has a security interest in personal property, perfected in a state which requires the issuance of a certificate of title on such property and the listing thereon of a security interest as a condition of perfection, does not have to protect such security interest by any further action in a state to which the property may thereafter be removed; this places an undue burden on prospective lienees in Alabama which does not have a registration and title statute; it appears the undue hardship to lenders in Alabama resulting from the effect of UCC § 9-103(4) was created by the legislature and must be removed by it, either by repeal, amendment, or passage of other correctional legislation. *Deposit Nat'l Bank v. Chrysler Credit Corp.*, 48 Ala. App. 161, 263 So. 2d 139 (Civ. App. 1972).

UCC § 9-103(4) relating to perfection of security interests in other states is not repealed by motor vehicle code provision regarding certificate of title to auto, and controls where auto was purchased in Illinois and registered in Ohio, where mortgagee's security interest was noted on Ohio certificate of title, and where owner's judgment creditor knew of foreign registration and that there was some lien, so that mortgagee's security interest under UCC § 9-103(4) was superior to that of creditor. *Town House Motel, Inc. v. Ward*, 2 Ill. App. 3d 699, 276 N.E.2d 809 (5th Dist. 1971).

Once a security interest (lien) is noted upon a certificate of title in a state which requires such notation for perfection, security interest (lien) remains perfected when vehicle is removed to another state, even if debtor has not obtained new certificate of title in other state. *Streule v. Gulf Fin. Corp.*, 265 A.2d 298 (D.C. 1970).

Where a house trailer was purchased in Virginia and the certificate of title issued by that state showed a bank's conditional sales contract as a lien thereon, it was unnecessary for the security holder to perfect its lien in New York within four months after the trailer was moved there, for subsection (4), rather than subsection (3) was controlling. In re White, 266 F. Supp. 863 (N.D.N.Y. 1967).

22. —Title to nontitle state.

Where bank had perfected security interest in automobile in Oklahoma, driver of car fraudulently obtained Oklahoma certificate of title which indicated there were no liens on vehicle, drove car to Nevada and sold it to defendant on May 15, 1971, trial court erred in dismissing bank's complaint for conversion of car on grounds that bank failed to prove car had been brought into Nevada within four-month period immediately preceding date when driver sold car to defendant, as prescribed by UCC § 9-103(3); evidence showed that driver took possession of automobile in Oklahoma in December, 1970, that he made two payments on vehicle which were mailed from Oklahoma, and that he obtained Oklahoma certificate of title in March, 1971, from which it could be inferred that automobile was in Oklahoma as late as March, 1971, within four months of time when defendant purchased it. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Where Texas bank perfected security interest in automobile located in Texas, a title state, and gave owner permission to take car to New York, a nontitle state, and license it there, with understanding that it would not have to relinquish its Texas title, and where owner, after driving car to New York and obtaining clear New York title certificate, drove car to Washington, a title state, obtained clear Washington title and within four months after leaving Texas sold car to Washington purchaser, Texas law governed initial perfection of security interest and, regardless of whether Texas bank perfected its security interest in compliance with Washington law, its security interest continued under UCC § 9-103(3) to be perfected in Washington for first four months after car was brought into state and, thus, upon owner's default, Texas bank could lawfully repossess car from Washington buyer. *Morris v. Seattle-First Nat'l Bank*, 10 Wash. App. 129, 516 P.2d 1055 (1973).

23. —Nontitle to title state.

Under UCC § 9-103, holder of security interest in automobile, perfected pursuant to laws of Minnesota, a nontitle state, who had no knowledge of its removal to

Nebraska, a title state, had priority over Nebraska purchaser without knowledge of such security interest who purchased automobile with clear Nebraska title within 4 months of its arrival in Nebraska; UCC § 9-103, Official Comment 7, makes it clear that subsection (4) does not apply to automobile which was sold under conditional sales contract in state which does not require indication on certificate of title of any security interest in property as condition of perfection, and which was subsequently brought into state which had such requirement; thus, in present case, pursuant to UCC § 9-103(3), question of whether plaintiff had perfected security interest in automobile when it was brought to Nebraska was governed by Minnesota law. *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974), overruled on other grounds, *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981).

New Jersey UCC § 9-103(4) should only be applied to goods which, at the time of entry into New Jersey, are covered by a certificate of title. New Jersey UCC § 9-103(3) should apply to all goods which are moved into New Jersey from noncertificate-of-title jurisdictions. If a certificate of title is subsequently acquired, New Jersey UCC § 9-103(3) remains applicable according to its terms. And with respect to professional buyers of goods, the four-month grace period provided in New Jersey UCC § 9-103(3) is absolute, and bona-fide status is no protection. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978).

In action to foreclose chattel mortgage on mobile home that was assigned to plaintiff by party that financed purchase of such home in British Columbia, Canada, where (1) plaintiff's security interest in such home was perfected by filing under British Columbia law, which did not issue certificates of title to mobile homes; (2) purchasers breached chattel mortgage's provisions by taking home from British Columbia into state of Washington without consent of plaintiff chattel-mortgage holder and secured Washington certificate of title to such home by falsely representing that they owned it free of any lien or security interest therein; and

(3) purchasers on basis of such certificate of title obtained loan from Washington lender and lender perfected security interest in home in accordance with Washington law, court would hold under UCC § 9-103(3) and (4), and also Washington statute dealing with perfection and loss of security interest where vehicle subject to interest had certificate of title, that as between the two holders of a perfected security interest in such home, holder of interest perfected in British Columbia had priority, since UCC § 9-103(4) does not apply to all security interests, but only to those that attached after certificate of title to vehicle was issued. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977) (citing annotation; also holding that the holder of security interest perfected in British Columbia must first exhaust its Canadian security before resorting to proceeds of sale, in state of Washington, of mobile home in suit).

Where security interest of secured party with respect to automobile was duly perfected in Arizona and Texas prior to time debtor brought automobile to Oklahoma and where Oklahoma certificate of title was prepared but not issued in Oklahoma, under UCC § 9-103(4), accomplished perfection in Arizona or Texas would continue in Oklahoma and security interest of secured party was superior to claim of subsequent creditor in Oklahoma. *McMillin v. Phoenix Telco Fed. Credit Union*, 429 F. Supp. 131 (W.D. Okla. 1976).

Subsection (4) does not apply to an automobile which was sold under a conditional sales contract in a state that does not require indication on a certificate of title of any security interest as a condition of perfection, although the automobile was subsequently brought into a state which had such a requirement. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

Under subsection (3) of this section the New York assignee of a conditional sales contract who has filed the contract in accordance with the then existing Uniform Commercial Code had made its reservation of title valid against all persons under New York Law as that state did not require a notation of the seller's interest

to appear on the title certificate, and at time the car buyer purported to sell it in Pennsylvania, the assignee held a perfected security interest in the car in that state. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

24. —Between title states.

Where (1) buyer purchased 1974 pickup truck on July 12, 1974, (2) secured party perfected security interest therein under New York law by obtaining certificate of title on which secured party's lien was noted, (3) buyer moved from New York to Oklahoma on June 13, 1975, and applied for and received Oklahoma certificate of title for such truck without surrendering New York certificate of title, which was still in secured party's possession in New York, (4) buyer was adjudicated bankrupt on October 18, 1976, and (5) secured party, as of date of buyer's adjudication of bankruptcy, had not filed any financing statement in Oklahoma reflecting its security interest in truck, court held that bankruptcy judge did not err in holding that notation of secured party's lien on New York certificate of title, which remained outstanding and unsurrendered on buyer's relocation to Oklahoma, was not sufficient to maintain secured party's perfected security interest in truck under UCC § 9-103(4). In such case, UCC § 9-103(3)-providing that previously perfected security interest in property subsequently brought into a second state continues perfected in second state for four months, after which it must be reperfected in second state-applies, and since secured party had never filed financing statement concerning truck in Oklahoma, it had no perfected security interest in truck as of date on which debtor was adjudicated bankrupt. *In re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

Where (1) Canadian creditor, which was assignee of buyer's automobile-purchase contract with Canadian dealer, perfected its lien on vehicle under Canadian law, (2) buyer acquired Canadian certificate of registration which did not require notation thereon of creditor's security interest, (3) buyer drove car to New Jersey, where he changed Canadian registration to New

Jersey registration and fraudulently obtained “clean” New Jersey certificate of title which showed no liens on vehicle, (4) buyer within four days after purchasing vehicle sold it to New Jersey used-car dealer, which in turn sold it to one of its customers, and (5) Canadian creditor sued New Jersey dealer for conversion, court would hold, on reinstating trial court’s granting of summary judgment for plaintiff, (1) that New Jersey UCC § 9-103(3) and (4) should be interpreted to protect interest of foreign lienholder, (2) that priority of plaintiff’s perfected security interest under Canadian law was not defeated by original buyer’s fraudulent securing of “clean” New Jersey certificate of title, and (3) that defendant dealer and professional buyer, which in good faith purchased vehicle with “clean” certificate of title, was not entitled to prevail over plaintiff which held valid but undisclosed foreign lien. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978) (noting that New Jersey had not adopted 1972 amendment of UCC § 9-103).

Auto subject to security interest perfected under Oklahoma law was brought into Texas without knowledge or consent of owners or holder of security interest; Texas certificate of title was issued to plaintiff dealer’s predecessor in interest; held, dealer took subject to outstanding security interest. *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App. 1970), *aff’d*, 465 S.W.2d 933, 42 A.L.R.3d 1158 (Tex. 1971)

(superseded by statute as stated in *Rutherford v. Whataburger, Inc.* (CA 5th Dist) 601 SW2d 441).

Truck was not sold in ordinary course of business; buyer had no knowledge of Florida source of origin of truck; buyer inquired of seller and checked proper county offices in New York and found that no liens had been filed against truck; Florida bank held chattel mortgage on truck; bank had permitted seller, who had acquired title in Florida, to register title in New York; both New York and Florida are title states; seller had failed to use proceeds of sale to pay off lien; held, lien of bank was subordinated to buyer’s purchase interest. *Seely v. First Bank & Trust*, 64 Misc. 2d 845 (1970).

25. —Between nontitle states.

Where finance company had perfected security interest in automobile in Oklahoma, a non-title state, car was registered in Alabama, also a non-title state, and then certificate of title was issued in Georgia, a certificate of title state, which showed no security interest, and vehicle was subsequently sold to purchaser in Alabama within four months after vehicle was removed from Oklahoma, finance company’s security interest was in full force and effect in Alabama when purchaser bought car and, hence, finance company’s claim was superior to that of purchaser. *GMAC v. Long-Lewis Hdwe. Co.*, 54 Ala. App. 188, 306 So. 2d 277 (Civ. App. 1974), *cert. denied*, 293 Ala. 752, 306 So. 2d 282 (1974).

RESEARCH REFERENCES

ALR. Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states. 10 A.L.R.2d 764.

Conflict of laws as to chattel mortgages and conditional sales of chattels. 13 A.L.R.2d 1312.

Elements and proof of crime of improper sale, removal, concealment, or disposal of property subject to security interest under UCC. 48 A.L.R.4th 819.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 11, 75.

16 Am. Jur. 2d, Conflict of Laws §§ 43, 50, 51.

68A Am. Jur. 2d, Secured Transactions §§ 8-10, 39-41.

Application and construction of code, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:1.

Applicability, in general, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:7, 9:10.

Filing; place; erroneous filing, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:613, 9:619.

Accounts, [contract rights,] general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Trans-

actions, §§ 253:2911 et seq.

CJS. 79 C.J.S., Secured Transactions § 6.

15A C.J.S., Conflict of Laws §§ 17 et seq.

§ 75-9-302. Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

SOURCES: Former 1972 Code § 75-9-302 [Codes, 1942, § 41A:9-302; Laws, 1966, ch. 316, § 9-302; Laws, 1977, ch. 452, § 15; Laws, 1986, ch. 401, § 1; Laws, 1990, ch. 384, § 50; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996] is now found in comparable provisions enacted at §§ 75-9-309, 75-9-310, and 75-9-311 by Laws, 2001, ch. 495, § 1. Present § 75-9-302 was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Description of property, see § 75-9-108.

Definitions, see § 75-9-201.

Filing provisions and agricultural liens, see § 75-9-310.

Priorities among conflicting security interests in and agricultural liens on same collateral, see § 75-9-322.

Priority of security interests in fixtures and crops, see § 75-9-334.

§ 75-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

SOURCES: Former 1972 Code § 75-9-303 [Codes, 1942, § 41A:9-303; Laws, 1966, ch. 316, § 9-303; Laws, 1996, ch. 468, § 64, eff from and after July 1, 1996] is now found in comparable provisions enacted at § 75-9-308 by Laws, 2001, ch. 495, § 1. Present § 75-9-303 was derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws,

1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Scope of Article, see § 75-9-109.

Priority of security interests in goods covered by certificate of title, see § 75-9-337.

JUDICIAL DECISIONS

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1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

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I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

A. In General.

6. Generally.

This section deals with accounts, contract rights and equipment relating to another state, and incoming goods already

subject to a security interest. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

The institution of distraint proceedings obviously does not fall within the intentment of this section. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

7. Controlling law.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such

security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (applying New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Recognition of the title certificate issued in the state of origin and perfection of the security interest noted thereon can continue only as long as the title certificate of the state of origin is the only certificate. Once a new certificate is issued in a second state, it becomes, under UCC § 9-103(4), "the jurisdiction which issued the certificate," and its law governs the perfec-

tion of a security interest. The underlying rationale of UCC § 9-103(4) is that there shall be only one title certificate for an automobile, which is that originally issued if it is still in existence. However, once a second certificate of title has been issued by a second state, it is the law of the second state which determines whether a perfected security interest exists in the vehicle, and the creditor must comply with the law of the second state in order to perfect his security interest. In *re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

The exclusiveness of the Vehicle Code registration and transfer requirements for perfection of security interests in automobiles is provided for under the Uniform Commercial Code § 9103(4). *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28 (4th Dist. 1968).

In a case where the issue was to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity or perfection of the security interest were not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

In a case where the issue is as to whether a buyer was in default under a contract of sale so as to give the seller a right to repossess the article sold, and where there is no issue as to the validity or perfection of a security interest, the question as to which law is to be applied to the transaction is governed by § 1-105(1) of the instant chapter and not by subsection (2) of the instant section. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

8. —Conflict of laws.

UCC § 9-102(1) intends that the substantive law of the place where the collat-

eral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing,

(b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re *Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Large earth-moving trucks unquestionably belong in classification of "road building equipment", "construction machinery", "automotive equipment", or all these classifications; held, where it is conceded that debtor has chief place of business in Colorado, law of that state, including law on conflicts, must govern with respect to conflicting claims to trucks taken as trade-in by dealer in connection with sale of other construction equipment to buyer in good faith. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969) (applying Colorado law).

If chief place of business of debtor is not in this state, law, including conflict-of-law rules, of jurisdiction where such chief place of business is located governs perfection of security interest and possibility

and effect of proper filing with regard to construction machinery. *GECC v. Western Crane & Rigging Co.*, 184 Neb. 212, 166 N.W.2d 409 (1969).

By adopting Illinois law, contract adopted Illinois conflicts rule of law, so that validity of security interest in goods under contract was to be determined by Indiana law, where goods were taken into Indiana within 30 days of attachment of security interest and where parties understood that property would be kept in Indiana. *In re Kokomo Times Publishing & Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968).

Where it had not adopted the Uniform Trust Receipts Act, the State of Georgia would not be bound to accept the procedural aspects of the Tennessee Act relative to recordation. *Chattanooga Dist. Corp. v. West*, 219 F. Supp. 140 (N.D. Ala. 1963) (applying Georgia law).

9. —Agreement of parties.

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in question, the law of the state of the domicile or place of business of the contracting party in question is controlling. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

10. Perfection.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case

because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978).

Secured party who had perfected security interest on property in South Dakota, but who did not file and perfect his interest in Iowa within four-month period after goods were transported to Iowa, had junior interest to buyer for value who purchased goods within four-month period, but who had no knowledge or notice of security interest, after lapse of four months without perfection of security interest in Iowa. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974) (citing annotation; applying Iowa law).

Plaintiff had properly filed security agreement perfecting security interest; defendant later perfected security interest by taking possession pursuant to agreement giving defendant right to use machine at issue until completion of work; held, plaintiff was entitled to machine when purchaser filed petition for arrangement under Bankruptcy Act while machine was in defendant's possession. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970) (applying New Jersey law).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

11. —Filing in debtor's principal place of business.

In conversion action to determine priority of security interests in bulldozer and

right to proceeds from its sale, where (1) bulldozer was sold in Michigan to Michigan buyer which gave seller an Indiana address, (2) buyer at time of sale was authorized to do business in Indiana and was mainly engaged in developing Indiana property, (3) seller assigned its security agreement listing bulldozer as collateral to plaintiff, and plaintiff filed financing statement with Indiana secretary of state, (4) defendant thereafter obtained security interest in bulldozer under security agreement with buyer, who listed it as collateral for loan from defendant, and filed financing statement with Michigan secretary of state, and (5) plaintiff then filed financing statement in Michigan after defendant's filing, court held (1) that Indiana was buyer's "chief place of business" under UCC § 9-103(2), (2) that Indiana therefore was proper place to file financing statement to perfect security interest in bulldozer, and (3) that since only plaintiff had perfected its security interest in Indiana, judgment was properly entered in plaintiff's favor. *Associates Fin. Servs. Co. v. First Nat'l Bank*, 82 Mich. App. 495, 266 N.W.2d 490 (1978).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973) (applying Kansas law).

The mobility of tractors, normally used in more than one jurisdiction, makes filing in debtor's principal place of business necessary under UCC § 9-103(2) in order to

perfect security interest therein, and bank which had not so filed could not prevail over tractor buyer's judgment creditor who levied against tractors in possession of buyer. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Where New Jersey was chief place of business of debtor which had entered into security agreement as to traxcavator, a heavy construction machine, rights of parties were governed by New Jersey law. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970).

12. Security interest in accounts and contract rights.

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

13. Miscellaneous.

Since Illinois vehicle code provided exclusive means of perfecting and giving notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

Transaction between contractor and surety for completion of public improvement project following contractor's default was not intended to have effect as security. *Aetna Cas. & Sur. Co. v. Perrotta*, 62 Misc. 2d 252 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Vir-

ginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

B. Mobile Goods.

14. Generally.

Industrial equipment may not be characterized as mobile goods within meaning of Code § 9-103(2). In *re Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969) (applying Pennsylvania law).

15. Incoming goods subject to security interest.

A security interest in a house trailer perfected in Virginia before the trailer was moved to Oklahoma was effective in the latter state under subsec. (3). *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

An assignee of a conditional sales agreement made in New York is protected as against a purchaser of the security in Pennsylvania for a period of four months provided that the security interest was perfected in New York before the security was brought into Pennsylvania. *Casterline v. GMAC*, 195 Pa. Super. 344, 171 A.2d 813 (1961).

16. Four month rule.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law

of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In *re Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Where (1) Pennsylvania seller sold boat to Pennsylvania buyer and delivered it to buyer in Maryland, (2) secured party, which had financed purchase of boat by conditional sales contract, perfected its security interest in boat by filing financing statement in Pennsylvania (3) buyer resold boat to third person in Maryland, (4) seller, as representative of secured party, thereafter came to Maryland, took possession of boat, and returned it to seller's premises in Pennsylvania, and (5) second buyer brought replevin action to recover possession of boat, court held (1) that under UCC § 9-103(3), secured party's security interest in boat, which had been perfected under Pennsylvania law, was

also perfected for four months under Maryland law, (2) that after such four-month period had run, secured party's failure to file financing statement in Maryland caused its security interest to become unperfected, and (3) that under UCC § 9-301(1)(c), such unperfected interest was subordinate to rights of second buyer, who was buyer not in ordinary course of business who gave value and received delivery of the collateral without knowledge of security interest therein and before such interest was reperfected in Maryland. *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980 (1978).

The majority of courts which have considered the question have concluded that UCC § 9-103(4) does not apply to all security interests, but only to those which attach after the certificate of title is issued. It may be argued that the statute, as thus interpreted, permits a person in possession of personal property to defraud an innocent purchaser. But it must be kept in mind that the legislature, in adopting the Uniform Commercial Code, sought to strike a balance between the interests of the prior lienholder and those of a subsequent, good-faith purchaser or creditor. In order to afford some protection to the party with the prior interest, he is given, under UCC § 9-103(3), a period of four months in which to perfect his interest in this state. After that, his priority is lost until he perfects the interest. If this protection is given, a prospective purchaser or creditor has the burden of making sure that the property has been located in this state for more than four months. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977).

One who takes title to incoming auto subject to security interest of assignee of conditional vendor during four months from time auto entered jurisdiction cannot prevail over assignee under UCC § 9-103(3). *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

17. —Priority.

Lien created in Massachusetts enjoyed superiority in New York for period of 4 months from date auto arrived in New

York without any further measures being undertaken by conditional vendor's assignee, who sought to recover from New York purchaser, to localize such foreign security interest. *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

Where cattle here in question were transported from Utah to Wyoming within 4 months of their delivery to debtor, under Wyoming Code, creditor's security interest perfected under laws of Utah is superior to any rights of innocent purchasers. *Utah Farm Prod. Credit Ass'n v. Dinner*, 302 F. Supp. 897 (D. Colo. 1969) (applying Wyoming law).

18. —Lapse of perfection.

Where holder of security interest in automobile which was perfected under Texas law did not reperfect its security interest within four-month period after automobile was brought into Arizona, interests of persons who purchased automobile during that four-month period were not subject to such security interest. *Arrow Ford, Inc. v. Western Landscape Constr. Co.*, 23 Ariz. App. 281, 532 P.2d 553 (1975).

Goods having been removed directly to New Jersey, failure to file financing statement in that state clearly renders security interest unperfected at end of four months even if court considered security interest to have been originally perfected in Pennsylvania; held, four months' period begins to run whether or not secured party has notice that collateral has been removed to another jurisdiction. *In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969).

19. —Particular examples.

Where (1) plaintiff Farmers Home Administration made loan to Mississippi farmer and properly perfected security interest in Mississippi in all of farmer's livestock, (2) farmer, without knowledge or approval of plaintiff, shipped livestock from Mississippi to Tennessee to be sold, (3) livestock, within four months of their removal to Tennessee, were sold to bona-fide purchasers by defendant livestock broker, (4) farmer did not apply sale proceeds to plaintiff's loan and defaulted on

loan payments, and (5) plaintiff took no action to perfect its security interest in Tennessee, court held (1) that Uniform Commercial Code should be adopted as relevant federal common law in Farmers Home Administration security-interest cases; (2) that if there should be lack of uniformity on particular issue, either because of nonuniform changes in UCC itself or because of differing interpretations of a uniform provision, court would ordinarily follow weight of authority; (3) that in present case, since right of plaintiff to recover in conversion against defendant depended on which of two interpretations should be given to four-months protection rule in UCC § 9-103(3), court would adopt interpretation favored by weight of authority, which is that UCC § 9-103(3) gives secured party four months of "absolute protection" in removal state without necessity of any additional filing in removal state at any time; and (4) that since defendant had sold livestock within four months of their removal to Tennessee, judgment would be entered for plaintiff. *United States v. Burnette-Carter Co.*, 575 F.2d 587 (6th Cir. Tenn. 1978), cert. denied, 439 U.S. 996, 99 S. Ct. 596, 58 L. Ed. 2d 669 (1978).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing,

(b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re *Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Perfected purchase money security interest from foreign state is not enforceable in Florida unless perfected within four-month period; this is clear legislative intent under UCC § 9-103(3) despite apparent injustice to holder of purchase money security interest who fails to register lien in Florida after motor vehicle is moved thereto. *GECC v. Hollywood Bank & Trust Co.*, 263 So. 2d 593 (Fla. App. 1972).

The innocent purchaser in New Jersey of an automobile subject to a security interest perfected in New York takes the vehicle subject to the rights of an assignee of the original New York conditional vendor where the transaction in New Jersey took place within four months after the conditional vendee had removed the automobile to that state, even though the

security interest had not then been perfected in New Jersey, for the four month period provided by subsec. (3) is an absolute period of protection of the vendor's security interest. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

A conditional vendor who fails to perfect his security interest within the four-month period provided by subsec. (3) is no longer protected, and a subsequent purchaser of the property for value and without notice of the security interest would take a superior title. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

20. Thirty day rule.

In bankruptcy proceeding involving conflicting interests in car purchased by debtor in Illinois prior to being declared bankrupt in Georgia, where (1) debtor created security interest in vehicle which holder duly perfected under Illinois statute that required such interest to be perfected by noting it on vehicle's certificate of title; (2) debtor at time of purchase informed secured party that debtor would remove vehicle to Georgia within 30 days for purposes other than transportation and debtor did remove it within such time, but secured party did not take any steps to perfect such security interest in Georgia; (3) debtor's trustee in bankruptcy claimed superior interest in vehicle under provision of Georgia certificate-of-title statute which declared that Georgia law would determine validity of out-of-state security interest in vehicle brought into Georgia if parties understood at time interest was created that vehicle would be kept in Georgia and vehicle was brought into Georgia within 30 days thereafter for purposes other than transportation; (4) secured party claimed superior interest in vehicle under another provision of the Georgia certificate-of-title statute which provided that security interest perfected under law of jurisdiction where vehicle was situated when interest attached would continue perfected in Georgia if name of holder of interest was shown on certificate of title issued by such other jurisdiction; and (5) secured party also contended that in light of Georgia version of UCC § 9-103(3), term "validity of secu-

rity interest" in statutory provision on which bankruptcy trustee based claim to vehicle in suit was not synonymous with "perfection of security interest," so as to sustain trustee's claim, federal court would certify to Supreme Court of Georgia question whether holder of security interest in vehicle in suit was also required to obtain Georgia certificate of title for such vehicle and to note thereon its security interest in order to protect it against claim of bankruptcy trustee. In *re McClintock*, 558 F.2d 732 (5th Cir. Ga. 1977), appeal decided, 571 F.2d 317 (5th Cir. Ga. 1978) (certifying question of Georgia law determinative of cause to Supreme Court of Georgia).

21. Movement of property covered by certificate of title.

Where bankrupt, using money borrowed from New York bank, purchased second hand truck in Ohio and acquired clean certificate of title in Ohio, bank's security interest not being noted on title certificate as required by Ohio law, bankrupt registered vehicle in Ohio using title certificate, although bank knew nothing of Ohio registration and title certificate nor of bankrupt's intention to register vehicle there, and although truck was garaged principally in New York, in accordance with UCC § 9-103(4) law of Ohio determined existence of perfected security interest prior to bank's lawful repossession of truck in state of New York and bank, therefore, did not obtain perfected security interest in New York by filing financing statement in New York. In *re Osborn*, 389 F. Supp. 1137 (N.D.N.Y. 1975) (applying New York law).

Under Virginia UCC, perfection of security interest would be governed by law of jurisdiction which issued certificate of title on mobile home, which in this case was West Virginia. In *re Smith*, 311 F. Supp. 900 (W.D. Va. 1970), *aff'd*, 437 F.2d 898 (4th Cir. Va. 1971).

UCC § 9-103(4) unequivocally removes application of UCC § 9-103(3) to any personal property covered by a certificate of title issued under a statute of any state which requires indication on a certificate of title of any security interest as a condition of perfection; in other words, one who has a security interest in personal prop-

erty, perfected in a state which requires the issuance of a certificate of title on such property and the listing thereon of a security interest as a condition of perfection, does not have to protect such security interest by any further action in a state to which the property may thereafter be removed; this places an undue burden on prospective lienees in Alabama which does not have a registration and title statute; it appears the undue hardship to lenders in Alabama resulting from the effect of UCC § 9-103(4) was created by the legislature and must be removed by it, either by repeal, amendment, or passage of other correctional legislation. *Deposit Nat'l Bank v. Chrysler Credit Corp.*, 48 Ala. App. 161, 263 So. 2d 139 (Civ. App. 1972).

UCC § 9-103(4) relating to perfection of security interests in other states is not repealed by motor vehicle code provision regarding certificate of title to auto, and controls where auto was purchased in Illinois and registered in Ohio, where mortgagee's security interest was noted on Ohio certificate of title, and where owner's judgment creditor knew of foreign registration and that there was some lien, so that mortgagee's security interest under UCC § 9-103(4) was superior to that of creditor. *Town House Motel, Inc. v. Ward*, 2 Ill. App. 3d 699, 276 N.E.2d 809 (5th Dist. 1971).

Once a security interest (lien) is noted upon a certificate of title in a state which requires such notation for perfection, security interest (lien) remains perfected when vehicle is removed to another state, even if debtor has not obtained new certificate of title in other state. *Streule v. Gulf Fin. Corp.*, 265 A.2d 298 (D.C. 1970).

Where a house trailer was purchased in Virginia and the certificate of title issued by that state showed a bank's conditional sales contract as a lien thereon, it was unnecessary for the security holder to perfect its lien in New York within four months after the trailer was moved there, for subsection (4), rather than subsection (3) was controlling. *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967).

22. —Title to nontitle state.

Where bank had perfected security interest in automobile in Oklahoma, driver

of car fraudulently obtained Oklahoma certificate of title which indicated there were no liens on vehicle, drove car to Nevada and sold it to defendant on May 15, 1971, trial court erred in dismissing bank's complaint for conversion of car on grounds that bank failed to prove car had been brought into Nevada within four-month period immediately preceding date when driver sold car to defendant, as prescribed by UCC § 9-103(3); evidence showed that driver took possession of automobile in Oklahoma in December, 1970, that he made two payments on vehicle which were mailed from Oklahoma, and that he obtained Oklahoma certificate of title in March, 1971, from which it could be inferred that automobile was in Oklahoma as late as March, 1971, within four months of time when defendant purchased it. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Where Texas bank perfected security interest in automobile located in Texas, a title state, and gave owner permission to take car to New York, a nontitle state, and license it there, with understanding that it would not have to relinquish its Texas title, and where owner, after driving car to New York and obtaining clear New York title certificate, drove car to Washington, a title state, obtained clear Washington title and within four months after leaving Texas sold car to Washington purchaser, Texas law governed initial perfection of security interest and, regardless of whether Texas bank perfected its security interest in compliance with Washington law, its security interest continued under UCC § 9-103(3) to be perfected in Washington for first four months after car was brought into state and, thus, upon owner's default, Texas bank could lawfully repossess car from Washington buyer. *Morris v. Seattle-First Nat'l Bank*, 10 Wash. App. 129, 516 P.2d 1055 (1973).

23. —Nontitle to title state.

Under UCC § 9-103, holder of security interest in automobile, perfected pursuant to laws of Minnesota, a nontitle state, who had no knowledge of its removal to Nebraska, a title state, had priority over Nebraska purchaser without knowledge of such security interest who purchased

automobile with clear Nebraska title within 4 months of its arrival in Nebraska; UCC § 9-103, Official Comment 7, makes it clear that subsection (4) does not apply to automobile which was sold under conditional sales contract in state which does not require indication on certificate of title of any security interest in property as condition of perfection, and which was subsequently brought into state which had such requirement; thus, in present case, pursuant to UCC § 9-103(3), question of whether plaintiff had perfected security interest in automobile when it was brought to Nebraska was governed by Minnesota law. *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974), overruled on other grounds, *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981).

New Jersey UCC § 9-103(4) should only be applied to goods which, at the time of entry into New Jersey, are covered by a certificate of title. New Jersey UCC § 9-103(3) should apply to all goods which are moved into New Jersey from noncertificate-of-title jurisdictions. If a certificate of title is subsequently acquired, New Jersey UCC § 9-103(3) remains applicable according to its terms. And with respect to professional buyers of goods, the four-month grace period provided in New Jersey UCC § 9-103(3) is absolute, and bona-fide status is no protection. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978).

In action to foreclose chattel mortgage on mobile home that was assigned to plaintiff by party that financed purchase of such home in British Columbia, Canada, where (1) plaintiff's security interest in such home was perfected by filing under British Columbia law, which did not issue certificates of title to mobile homes; (2) purchasers breached chattel mortgage's provisions by taking home from British Columbia into state of Washington without consent of plaintiff chattel-mortgage holder and secured Washington certificate of title to such home by falsely representing that they owned it free of any lien or security interest therein; and (3) purchasers on basis of such certificate of title obtained loan from Washington lender and lender perfected security inter-

est in home in accordance with Washington law, court would hold under UCC § 9-103(3) and (4), and also Washington statute dealing with perfection and loss of security interest where vehicle subject to interest had certificate of title, that as between the two holders of a perfected security interest in such home, holder of interest perfected in British Columbia had priority, since UCC § 9-103(4) does not apply to all security interests, but only to those that attached after certificate of title to vehicle was issued. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977) (citing annotation; also holding that the holder of security interest perfected in British Columbia must first exhaust its Canadian security before resorting to proceeds of sale, in state of Washington, of mobile home in suit).

Where security interest of secured party with respect to automobile was duly perfected in Arizona and Texas prior to time debtor brought automobile to Oklahoma and where Oklahoma certificate of title was prepared but not issued in Oklahoma, under UCC § 9-103(4), accomplished perfection in Arizona or Texas would continue in Oklahoma and security interest of secured party was superior to claim of subsequent creditor in Oklahoma. *McMillin v. Phoenix Telco Fed. Credit Union*, 429 F. Supp. 131 (W.D. Okla. 1976).

Subsection (4) does not apply to an automobile which was sold under a conditional sales contract in a state that does not require indication on a certificate of title of any security interest as a condition of perfection, although the automobile was subsequently brought into a state which had such a requirement. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

Under subsection (3) of this section the New York assignee of a conditional sales contract who has filed the contract in accordance with the then existing Uniform Commercial Code had made its reservation of title valid against all persons under New York Law as that state did not require a notation of the seller's interest to appear on the title certificate, and at time the car buyer purported to sell it in Pennsylvania, the assignee held a per-

fectured security interest in the car in that state. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

24. —Between title states.

Where (1) buyer purchased 1974 pickup truck on July 12, 1974, (2) secured party perfected security interest therein under New York law by obtaining certificate of title on which secured party's lien was noted, (3) buyer moved from New York to Oklahoma on June 13, 1975, and applied for and received Oklahoma certificate of title for such truck without surrendering New York certificate of title, which was still in secured party's possession in New York, (4) buyer was adjudicated bankrupt on October 18, 1976, and (5) secured party, as of date of buyer's adjudication of bankruptcy, had not filed any financing statement in Oklahoma reflecting its security interest in truck, court held that bankruptcy judge did not err in holding that notation of secured party's lien on New York certificate of title, which remained outstanding and unsurrendered on buyer's relocation to Oklahoma, was not sufficient to maintain secured party's perfected security interest in truck under UCC § 9-103(4). In such case, UCC § 9-103(3)-providing that previously perfected security interest in property subsequently brought into a second state continues perfected in second state for four months, after which it must be reperfected in second state-applies, and since secured party had never filed financing statement concerning truck in Oklahoma, it had no perfected security interest in truck as of date on which debtor was adjudicated bankrupt. In *re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

Where (1) Canadian creditor, which was assignee of buyer's automobile-purchase contract with Canadian dealer, perfected its lien on vehicle under Canadian law, (2) buyer acquired Canadian certificate of registration which did not require notation thereon of creditor's security interest, (3) buyer drove car to New Jersey, where he changed Canadian registration to New Jersey registration and fraudulently obtained "clean" New Jersey certificate of title which showed no liens on vehicle, (4)

buyer within four days after purchasing vehicle sold it to New Jersey used-car dealer, which in turn sold it to one of its customers, and (5) Canadian creditor sued New Jersey dealer for conversion, court would hold, on reinstating trial court's granting of summary judgment for plaintiff, (1) that New Jersey UCC § 9-103(3) and (4) should be interpreted to protect interest of foreign lienholder, (2) that priority of plaintiff's perfected security interest under Canadian law was not defeated by original buyer's fraudulent securing of "clean" New Jersey certificate of title, and (3) that defendant dealer and professional buyer, which in good faith purchased vehicle with "clean" certificate of title, was not entitled to prevail over plaintiff which held valid but undisclosed foreign lien. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978) (noting that New Jersey had not adopted 1972 amendment of UCC § 9-103).

Auto subject to security interest perfected under Oklahoma law was brought into Texas without knowledge or consent of owners or holder of security interest; Texas certificate of title was issued to plaintiff dealer's predecessor in interest; held, dealer took subject to outstanding security interest. *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App. 1970), *aff'd*, 465 S.W.2d 933, 42 A.L.R.3d 1158 (Tex. 1971) (superseded by statute as stated in *Rutherford v. Whataburger, Inc.* (CA 5th Dist) 601 SW2d 441).

Truck was not sold in ordinary course of business; buyer had no knowledge of Florida source of origin of truck; buyer inquired of seller and checked proper county offices in New York and found that no liens had been filed against truck; Florida bank held chattel mortgage on truck; bank had permitted seller, who had acquired title in Florida, to register title in New York; both New York and Florida are title states; seller had failed to use proceeds of sale to pay off lien; held, lien of bank was subordinated to buyer's purchase interest. *Seely v. First Bank & Trust*, 64 Misc. 2d 845 (1970).

25. —Between nontitle states.

Where finance company had perfected security interest in automobile in Okla-

homa, a non-title state, car was registered in Alabama, also a non-title state, and then certificate of title was issued in Georgia, a certificate of title state, which showed no security interest, and vehicle was subsequently sold to purchaser in Alabama within four months after vehicle was removed from Oklahoma, finance

company's security interest was in full force and effect in Alabama when purchaser bought car and, hence, finance company's claim was superior to that of purchaser. *GMAC v. Long-Lewis Hdwe. Co.*, 54 Ala. App. 188, 306 So. 2d 277 (Civ. App. 1974), cert. denied, 293 Ala. 752, 306 So. 2d 282 (1974).

§ 75-9-304. Law governing perfection and priority of security interests in deposit accounts.

(a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) The following rules determine a bank's jurisdiction for purposes of this part:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part, this article, or the Uniform Commercial Code, that jurisdiction is the bank's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of the preceding paragraphs applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of the preceding paragraphs applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

SOURCES: Former 1972 Code § 75-9-304 [Codes, 1942, § 41A:9-304; Laws, 1966, ch. 316, § 9-304; Laws, 1977, ch. 452, § 16; Laws, 1990, ch. 384, § 51; Laws, 1996, ch. 460, § 25; Laws, 1996, ch. 468, § 65, eff from and after July 1, 1996] is now found in comparable provisions enacted at § 75-9-312 by Laws, 2001, ch. 495, § 1. Present § 75-9-304 was derived from 1972 Code § 75-8-110 [Laws, 1996, ch. 468, § 11, eff from and after July 1, 1996] and former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495; Laws, 2002, ch. 453, § 6, eff from and after passage (approved Mar. 20, 2002.)

Amendment Notes — The 2002 amendment substituted “its customer” for “the debtor” in (b)(1).

Cross References — Priority of security interests in deposit account, see § 75-9-327.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

6. Generally.
7. Controlling law.
8. —Conflict of laws.
9. —Agreement of parties.
10. Perfection.
11. —Filing in debtor's principal place of business.
12. Security interest in accounts and contract rights.
13. Miscellaneous.

III. Under former § 75-9-305.

14. In general.
15. Goods.
16. Instruments.
17. Money.
18. Documents.
19. Chattel paper.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

6. Generally.

This section deals with accounts, contract rights and equipment relating to another state, and incoming goods already subject to a security interest. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

The institution of distraint proceedings obviously does not fall within the intentment of this section. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

7. Controlling law.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law

rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and

to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (applying New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Recognition of the title certificate issued in the state of origin and perfection of the security interest noted thereon can continue only as long as the title certificate of the state of origin is the only certificate. Once a new certificate is issued in a second state, it becomes, under UCC § 9-103(4), "the jurisdiction which issued the certificate," and its law governs the perfection of a security interest. The underlying rationale of UCC § 9-103(4) is that there shall be only one title certificate for an automobile, which is that originally issued if it is still in existence. However, once a second certificate of title has been issued by a second state, it is the law of the second state which determines whether a perfected security interest exists in the vehicle, and the creditor must comply with the law of the second state in order to perfect his security interest. In *re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

The exclusiveness of the Vehicle Code registration and transfer requirements for perfection of security interests in automobiles is provided for under the Uniform Commercial Code § 9103(4). *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28 (4th Dist. 1968).

In a case where the issue was to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsec-

tion (1) of § 1-105 of the instant chapter and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity or perfection of the security interest were not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

In a case where the issue is as to whether a buyer was in default under a contract of sale so as to give the seller a right to repossess the article sold, and where there is no issue as to the validity or perfection of a security interest, the question as to which law is to be applied to the transaction is governed by § 1-105(1) of the instant chapter and not by subsection (2) of the instant section. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

8. —Conflict of laws.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v.*

Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and

could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Large earth-moving trucks unquestionably belong in classification of "road building equipment", "construction machinery", "automotive equipment", or all these classifications; held, where it is conceded that debtor has chief place of business in Colorado, law of that state, including law on conflicts, must govern with respect to conflicting claims to trucks taken as trade-in by dealer in connection with sale of other construction equipment to buyer in good faith. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969) (applying Colorado law).

If chief place of business of debtor is not in this state, law, including conflict-of-law rules, of jurisdiction where such chief place of business is located governs perfection of security interest and possibility and effect of proper filing with regard to construction machinery. *GECC v. Western Crane & Rigging Co.*, 184 Neb. 212, 166 N.W.2d 409 (1969).

By adopting Illinois law, contract adopted Illinois conflicts rule of law, so that validity of security interest in goods under contract was to be determined by Indiana law, where goods were taken into Indiana within 30 days of attachment of security interest and where parties understood that property would be kept in Indiana. In re *Kokomo Times Publishing & Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968).

Where it had not adopted the Uniform Trust Receipts Act, the State of Georgia would not be bound to accept the procedural aspects of the Tennessee Act relative to recordation. *Chattanooga Disct. Corp. v. West*, 219 F. Supp. 140 (N.D. Ala. 1963) (applying Georgia law).

9. —Agreement of parties.

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in

question, the law of the state of the domicil or place of business of the contracting party in question is controlling. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

10. Perfection.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978) (Also rejecting defendants' content on that Alabama UCC § 9-103(4) was inapplicable because Illinois certificate of title had not been issued when vehicle entered Alabama, since such interpretation would nullify "relation-back" features of Illinois certificate-of-title law).

Secured party who had perfected security interest on property in South Dakota, but who did not file and perfect his inter-

est in Iowa within four-month period after goods were transported to Iowa, had junior interest to buyer for value who purchased goods within four-month period, but who had no knowledge or notice of security interest, after lapse of four months without perfection of security interest in Iowa. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974).

Plaintiff had properly filed security agreement perfecting security interest; defendant later perfected security interest by taking possession pursuant to agreement giving defendant right to use machine at issue until completion of work; held, plaintiff was entitled to machine when purchaser filed petition for arrangement under Bankruptcy Act while machine was in defendant's possession. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970) (applying New Jersey law).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

11. —Filing in debtor's principal place of business.

In conversion action to determine priority of security interests in bulldozer and right to proceeds from its sale, where (1) bulldozer was sold in Michigan to Michigan buyer which gave seller an Indiana address, (2) buyer at time of sale was authorized to do business in Indiana and was mainly engaged in developing Indiana property, (3) seller assigned its security agreement listing bulldozer as collateral to plaintiff, and plaintiff filed financing statement with Indiana secretary of state, (4) defendant thereafter obtained security interest in bulldozer under security agreement with buyer, who listed it as collateral for loan from defendant, and filed financing statement with Michigan secretary of state, and (5) plaintiff then filed financing statement in Michigan after defendant's filing, court held (1) that Indiana was buyer's "chief place of business" under UCC § 9-103(2), (2) that Indiana therefore was proper place to file financing statement to perfect security interest in bulldozer, and (3) that since

only plaintiff had perfected its security interest in Indiana, judgment was properly entered in plaintiff's favor. *Associates Fin. Servs. Co. v. First Nat'l Bank*, 82 Mich. App. 495, 266 N.W.2d 490 (1978).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973) (applying Kansas law).

The mobility of tractors, normally used in more than one jurisdiction, makes filing in debtor's principal place of business necessary under UCC § 9-103(2) in order to perfect security interest therein, and bank which had not so filed could not prevail over tractor buyer's judgment creditor who levied against tractors in possession of buyer. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Where New Jersey was chief place of business of debtor which had entered into security agreement as to traxcavator, a heavy construction machine, rights of parties were governed by New Jersey law. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970).

12. Security interest in accounts and contract rights.

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached

as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

13. Miscellaneous.

Since Illinois vehicle code provided exclusive means of perfecting and giving notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

Transaction between contractor and surety for completion of public improvement project following contractor's default was not intended to have effect as security. *Aetna Cas. & Sur. Co. v. Perrotta*, 62 Misc. 2d 252 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

III. Under former § 75-9-305.

14. In general.

Under UCC, parties to security agreement were free to decide who should have right to possession of collateral. *American Honda Motor Co. v. United States*, 363 F. Supp. 988 (S.D.N.Y. 1973).

Bare possession of checks was sufficient to create security interest under § 9-305. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

Under the statute, the actions of one seeking to repossess certain personal property from a defaulting vendee were insufficient to perfect the vendor's security interest. *L.B. Smith, Inc. v. Foley*, 341 F. Supp. 810 (W.D.N.Y. 1972).

15. Goods.

The filing of a financing statement is unnecessary to perfect a security interest in United States coins having a numismatic value in excess of their face value, pledged with and delivered to a bank as collateral for a loan; for such coins are to be considered as “goods” rather than as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), *aff’d*, 387 F.2d 118 (8th Cir. Mo. 1968).

16. Instruments.

In an action by a bank against a purchaser of truck bodies to obtain monies paid by the purchaser to the Internal Revenue Service after the IRS had issued a tax levy against funds owing to the seller of truck bodies, the trial court properly granted judgment for the bank where the contract between the seller and the purchaser had been delivered, assigned and accepted by the bank to secure a loan to the seller and, thereby, gave the bank a perfected security interest in the contract, an instrument under § 75-9-105, which held priority over the tax lien of the IRS which had never been filed at the principal place of business of the taxpayer. *International Harvester Co. v. Peoples Bank & Trust Co.*, 402 So. 2d 856 (Miss. 1981).

Where a security interest in the proceeds of promissory notes was perfected before the holder of that interest received notice of the existence of a previously filed Internal Revenue Service lien, the holder’s right to the proceeds of the notes is not affected by the lien. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where two certificates of deposit were indorsed in blank by owners and delivered to bank to enable third party to obtain line of credit from bank; where in connection with delivery of certificates, owners thereof also simultaneously executed two instruments entitled “Consent to Pledge” and “Security Agreement-Pledge” which specifically described collateral (the two certificates of deposit) for proposed extension of credit by bank; and where bank in reliance on such instruments and delivery of the collateral advanced desired line of credit to third party, effect of transaction under UCC § 9-304(1) and § 9-305 was to create and perfect valid security interest in certificates in favor of bank which was

enforceable under UCC § 9-203(1). *Montavon v. Alamo Nat’l Bank*, 554 S.W.2d 787 (Tex. Civ. App. 1977).

When bank surrendered possession of note which it had held as security for loan for more than a year, bank lost security interest which it had previously held. *McIlroy Bank v. First Nat’l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972).

17. Money.

A security interest in money (either originally given or received as proceeds from the negotiation of an instrument) is perfected by possession, and a deposit made by lessee with lessor to secure performance of lease could be set of against lessor’s claim against bankrupt lessee. *In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff’d*, 383 F.2d 606 (5th Cir. Ga. 1967).

Financing statements are not required to be filed to perfect possessory security interest in money; security interests in money can only be perfected by possession. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

A bankruptcy debtor’s pre-petition payment to law firms, and their retention of retainers without further action, created valid security interest in favor of law firms; perfection of security interest was achieved by law firms’ continuous possession of debtor’s funds, subject to the statute of frauds and amounts of compensation actually allowed by court. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

Retainers paid by bankruptcy debtor to law firms pre-petition, in which law firms had security interest perfected through possession, were nullified by statute of frauds only to extent that compensation for firm was earned and expenses incurred more than 15 months after firm obtained retainer. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

18. Documents.

Where corporation’s stock was physically endorsed by guarantor and voluntarily delivered to corporation as security pursuant to terms of guarantee agreement, and where corporation’s receiver subsequently took possession of stock cer-

tificates as officer of court and pursuant to statutory authority, such possession was necessary to maintain corporation's security interest in stock under UCC §§ 9-304 and 9-305, and could not be considered prejudgment seizure of property. State ex rel. Hunt v. Liberty Investors Life Ins. Co., 543 P.2d 1390 (Okla. 1975).

Service of order of attachment, which was later vacated, upon garnishee in possession of stock certificates was insufficient to perfect assignee's security interest in stock and to place garnishee and assignor's creditor on notice that assignee had secured interest in shares, whereas garnishee and assignor's creditor, by possession, did properly perfect their security interests under UCC § 9-305. Friedman v. Fein, 46 A.D.2d 886 (2d Dep't 1974).

19. Chattel paper.

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for \$180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior \$60,000 debt, indorsed them to creditor's order, and delivered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor \$135,000 on notes and notes were still in creditor's possession as collateral for payment of \$28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus due to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it,

delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25, 1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first creditor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned to plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff nor its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) be-

cause of first creditor's failure to indorse them to plaintiff's order. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978). Under UCC § 9-305, possessory secu-

rity interest in ordinary chattel paper requires no filing for perfection. *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 371 N.E.2d 523 (1977).

§ 75-9-305. Law governing perfection and priority of security interests in investment property.

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in Section 75-8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in Section 75-8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this article, or the Uniform Commercial Code, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

- (c) The local law of the jurisdiction in which the debtor is located governs:
- (1) Perfection of a security interest in investment property by filing;
 - (2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and
 - (3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

SOURCES: Former 1972 Code § 75-9-305 [Codes, 1942, § 41A:9-305; Laws, 1966, ch. 316, § 9-305; Laws, 1977, ch. 452, § 17; Laws, 1990, ch. 384, § 52, 1996, ch. 460, § 26; Laws, 1996, ch. 468, § 66, eff from and after July 1, 1996] is now found in comparable provisions enacted at §§ 75-9-306 and 75-9-313 by Laws, 2001, ch. 495, § 1. Present § 75-9-305 was derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of security interests in investment property, see § 75-9-328.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103(6).

6. Perfection.
7. —Filing in debtor's principal place of business.
8. Security interest in accounts and contract rights.
9. Miscellaneous.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103(6).

6. Perfection.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama

to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978) (Also rejecting defendants' content on that Alabama UCC § 9-103(4) was inapplicable because Illinois certificate of title had not been issued when vehicle entered Alabama, since such interpretation would nullify "relation-back" features of Illinois certificate-of-title law).

Secured party who had perfected security interest on property in South Dakota, but who did not file and perfect his interest in Iowa within four-month period after goods were transported to Iowa, had junior interest to buyer for value who purchased goods within four-month period, but who had no knowledge or notice of security interest, after lapse of four months without perfection of security interest in Iowa. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974).

Plaintiff had properly filed security agreement perfecting security interest; defendant later perfected security interest by taking possession pursuant to agreement giving defendant right to use machine at issue until completion of work; held, plaintiff was entitled to machine when purchaser filed petition for arrangement under Bankruptcy Act while machine was in defendant's possession. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970) (applying New Jersey law).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

7. —Filing in debtor's principal place of business.

In conversion action to determine priority of security interests in bulldozer and right to proceeds from its sale, where (1) bulldozer was sold in Michigan to Michigan buyer which gave seller an Indiana address, (2) buyer at time of sale was authorized to do business in Indiana and was mainly engaged in developing Indiana property, (3) seller assigned its security agreement listing bulldozer as collateral to plaintiff, and plaintiff filed financing statement with Indiana secretary of state, (4) defendant thereafter obtained security interest in bulldozer under security agreement with buyer, who listed it as collateral for loan from defendant, and filed financing statement with Michigan secretary of state, and (5) plaintiff then filed financing statement in Michigan after defendant's filing, court held (1) that Indiana was buyer's "chief place of business" under UCC § 9-103(2), (2) that

Indiana therefore was proper place to file financing statement to perfect security interest in bulldozer, and (3) that since only plaintiff had perfected its security interest in Indiana, judgment was properly entered in plaintiff's favor. *Associates Fin. Servs. Co. v. First Nat'l Bank*, 82 Mich. App. 495, 266 N.W.2d 490 (1978).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973).

The mobility of tractors, normally used in more than one jurisdiction, makes filing in debtor's principal place of business necessary under UCC § 9-103(2) in order to perfect security interest therein, and bank which had not so filed could not prevail over tractor buyer's judgment creditor who levied against tractors in possession of buyer. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Where New Jersey was chief place of business of debtor which had entered into security agreement as to traxcavator, a heavy construction machine, rights of parties were governed by New Jersey law. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970).

8. Security interest in accounts and contract rights.

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security

interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

9. Miscellaneous.

Since Illinois vehicle code provided exclusive means of perfecting and giving notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate

seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

Transaction between contractor and surety for completion of public improvement project following contractor's default was not intended to have effect as security. *Aetna Cas. & Sur. Co. v. Perrotta*, 62 Misc. 2d 252 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

§ 75-9-306. Law governing perfection and priority of security interests in letter-of-credit rights.

(a) Subject to subsection (c), the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) For purposes of this part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in Section 75-5-116.

(c) This section does not apply to a security interest that is perfected only under Section 75-9-308(d).

SOURCES: Former 1972 Code § 75-9-306 [Codes, 1942, § 41A:9-306; Laws, 1966, ch. 316, § 9-306; Laws, 1977, ch. 452, § 18; Laws, 1996, ch. 468, § 67, eff from and after July 1, 1996] is now found in comparable provisions enacted at § 75-9-315 by Laws, 2001, ch. 495, § 1. Present § 75-9-306 was derived from 1972 Code § 75-8-110 [Laws, 1996, ch. 468, § 11, eff from and after July 1, 1996] and former 1972 Code §§ 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and 75-9-305 [Codes, 1942, § 41A:9-305; Laws, 1966, ch. 316, § 9-305; Laws, 1977, ch. 452, § 17; Laws, 1990, ch. 384, § 52, 1996, ch. 460, § 26; Laws, 1996, ch. 468, § 66, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of security interests in letter-of-credit right, see § 75-9-329.

§ 75-9-307. Location of debtor.

(a) In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one (1) place of business is located at its place of business.

(3) A debtor that is an organization and has more than one (1) place of business is located at its chief executive office.

(c) Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c).

(e) A registered organization that is organized under the law of a state is located in that state.

(f) Except as otherwise provided in subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location; or

(3) In the District of Columbia, if neither paragraph (1) nor paragraph (2) applies.

(g) A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) The United States is located in the District of Columbia.

(i) A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one (1) state.

(j) A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) This section applies only for purposes of this part.

SOURCES: Former 1972 Code § 75-9-307 [Codes, 1942, § 41A:9-307; Laws, 1966, ch. 316, § 9-307; Laws, 1977, ch. 452, § 19; Laws, 1986, ch. 482, § 1, eff from and after December 24, 1986 (the date Section 1324 of the Food Security Act of 1985 became effective)] is now found in comparable provisions enacted at §§ 75-9-320 and 75-9-323 by Laws, 2001, ch. 495, § 1. Present § 75-9-307 was derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

SUBPART 2.

PERFECTION.

SEC.

- 75-9-308. When security interest or agricultural lien is perfected; continuity of perfection.
- 75-9-309. Security interest perfected upon attachment.
- 75-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.
- 75-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.
- 75-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.
- 75-9-313. When possession by or delivery to secured party perfects security interest without filing.
- 75-9-314. Perfection by control.
- 75-9-315. Secured party's rights on disposition of collateral and in proceeds.
- 75-9-316. Continued perfection of security interest following change in governing law.

§ 75-9-308. When security interest or agricultural lien is perfected; continuity of perfection.

(a) Except as otherwise provided in this section and Section 75-9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 75-9-310 through 75-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in Section 75-9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.

(d) Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

SOURCES: Former 1972 Code § 75-9-308 [Codes, 1942, § 41A:9-308; Laws, 1966, ch. 316, § 9-308; Laws, 1977, ch. 452, § 20, eff from and after April 1, 1978] is now found in comparable provisions enacted at § 75-9-330 by Laws, 2001, ch. 495, § 1. Present § 75-9-308 was derived from former 1972 Code §§ 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and 75-9-303 [Codes, 1942, § 41A:9-303; Laws, 1966, ch. 316, § 9-303; Laws, 1996, ch. 468, § 64, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Continuation of perfected security interest in motor vehicle, see § 63-21-53.

Scope of Article, see § 75-9-109.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-303.

6. In general.
7. Secured debt distinguished.
8. Applicable steps.
9. Upon possession by secured party.
10. Upon attachment alone.
11. Upon attachment where filing required.
12. Upon filing.
13. Upon compliance with certificate of title laws.
14. Priority of subsequent liens.
15. Continuity.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-303.

6. In general.

A creditor could not recover as a claimant in trustee process with the bank as the trustee, beyond the total of whatever

amounts might be traceable as having been deposited with the bank as the proceeds of the collateral sold subject to the debtor's security interest, where the debtor had deposited the money received from sales of the collateral with other monies received from other sources. *Emerson Radio of New England v. Stevens Television & Appliance Corp.*, 38 Mass. App. Dec. 41 (1967).

Under this section, a bank can be made subject to trustee process for monies collected subject to a perfected security interest in the proceeds, only insofar as the funds can be identified. *Emerson Radio of New England v. Stevens Television & Appliance Corp.*, 38 Mass. App. Dec. 41 (1967).

Under secured note issued 6 months prior to bankruptcy covering both overdue and future accounting services, value was not given until work was actually performed, and claim for services rendered within 4 months of bankruptcy was not entitled to secured status. *E.F. Corp. v. Smith*, 496 F.2d 826 (10th Cir. 1974).

Financing statement which identified the debtor, an individual named Henry Platt, as Platt Fur Co., an unregistered fictitious name for debtor's business, was not "seriously misleading" and did not prejudice the perfection of the creditor's claim. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

That the financing statement may be filed prior to the making of a security agreement, and that a security interest need not be in existence at the time the financing statement is filed, is clearly contemplated under the provisions of this section. *In re United Thrift Stores, Inc.*, 242 F. Supp. 714 (D.N.J. 1965), *aff'd*, 363 F.2d 11 (3d Cir. N.J. 1966).

Under subsection (1) of the instant section, a security interest is perfected only when it has attached and when all the applicable steps required for perfection have been taken. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

Under subsection (1) of the instant section, a lien is not perfected where one of the applicable steps required for perfection, such as the filing of a financing statement with the city clerk under § 9-401(1)(c), is not taken, and this is so even though the lien may, under § 9-401(2), be effective against a person having knowledge of the contents of the financing statement. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

In an action by a trustee in bankruptcy to recover for the estate assets taken over by holders of financing contracts, wherein the contract holders, who had filed financing statements pursuant to the Uniform Commercial Code, defended on the ground that they were secured creditors, mixed questions of fact and law being involved, the matter was too complex to permit solution on motion for a summary judgment, in whole or in part. *Hurwitz v. Fidelity Am. Fin. Corp.*, 179 F. Supp. 550 (E.D. Pa. 1960).

7. Secured debt distinguished.

This section of the Code relates to secured transactions insofar as third persons are concerned and does not determine the effect of a secured transaction as between the original debtor and the original creditor. *Anderson v. First Jackson-*

ville Bank, 243 Ark. 977, 423 S.W.2d 273 (1968).

8. Applicable steps.

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

As between the parties to a conditional sales contract, a valid, effective, and perfected security interest is created upon the execution of the instrument, and filing, and recordation, required as to third parties, are unnecessary as between the vendor and the vendee themselves. *United States v. Lebanon Woolen Mills Corp.*, 241 F. Supp. 393 (D.N.H. 1964).

Since under New York Conditional Sales Act the vendor or an assignee of the vendor is protected as against any purchaser provided that the conditional sale agreement is recorded within 10 days after the making of the conditional sale, it follows that the security interest is deemed perfected during the 10-day statutory period allowed for recording, and so where the security was brought into Pennsylvania during the statutory period, the security interest must be considered as

having been perfected at that time. *Casterline v. GMAC*, 195 Pa. Super. 344, 171 A.2d 813 (1961).

9. Upon possession by secured party.

Contention of manufacturer, who sold ten mobile homes to dealer on consignment basis, that even if inventory financier's security interest in such homes had attached under UCC § 9-303(1) while homes were in dealer's possession, such interest became unenforceable when manufacturer regained possession of homes from dealer, which contention was based on UCC § 2-326(2) which subjects consigned "sale-or-return" goods to claims of buyer's creditors while goods are in buyer's possession, could not be sustained, since UCC § 2-326(2) merely limits creditors whose claims may attach to those who have claims during period of buyer's possession and cannot be interpreted to defeat security interest that has attached during this possessory period. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

10. Upon attachment alone.

Since television set and tape player were consumer goods, filing was not necessary to perfect purchase money security interest of conditional seller who thus had priority over security interest of pawnbroker who subsequently took possession of goods as security for loan. *Kimbrell's Furn. Co. v. Friedman*, 261 S.C. 172, 198 S.E.2d 803 (1973).

Where consumer goods, which in Massachusetts include automobiles, are purchased under a conditional sales contract, the security interest, under the instant section, becomes perfected when it has attached, and nothing other than the execution and delivery of the contract is required to make it attach. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

11. Upon attachment where filing required.

In action by inventory financier to recover damages from manufacturer for conversion of ten mobile homes sold by manufacturer on consignment basis to dealer, as to which homes inventory financier claimed perfected security interest, (1)

manufacturer's claim that inventory financier's lien never attached to homes, which claim was based on "after-acquired property" nature of financier's lien and financier's alleged failure to advance funds to dealer with specific reference to such homes, could not be sustained, since under UCC § 9-204(3), validity of after-acquired property clauses in security agreements was no longer open to question; (2) in present case, first two requirements of UCC § 9-204(1)—namely, that there must be agreement that security interest attach and secured party must give value—were clearly met by dealer's signing security agreement in favor of inventory financier and financier's advancing substantial funds pursuant to such agreement; (3) third requirement of UCC § 9-204(1)—namely, that debtor must acquire rights in collateral—was satisfied when dealer obtained possession of homes pursuant to consignment agreement between dealer and manufacturer; (4) under UCC § 2-326(2), dealing with goods held on sale or return, homes were subject to claims of dealer's creditors while in dealer's possession; and (5) under UCC § 9-303(1), inventory financier's security interest, which had been properly filed, became perfected when it attached to homes at time dealer obtained possession thereof. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

12. Upon filing.

Letter allegedly establishing assignment of foreign exchange contract rights to bank did not measure up to security agreement under UCC since it failed to contain "description of the collateral" as required by § 9-203(1)(a). Moreover, bank

failed to file financing statement, as required by §§ 9-302(1) and 9-303 and, thus, failed to obtain valid and perfected assignment of contract rights. Purported assignment was not exempt from filing under UCC § 9-302(1)(e) since, at time assignee allegedly assigned contract worth \$1,000,000, assignee's total "outstanding accounts or contract rights" were \$4,439,300; thus, assignment transferred just under 20 percent of assignee's accounts, including assigned contract right, which constituted "significant part" of assignee's outstanding accounts, especially in view of high absolute value of transaction at issue. *Miller v. Wells Fargo Bank Int'l Corp.*, 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. N.Y. 1976).

Where seller of mobile homes assigned instalment contracts thereon to bank which filed financing statement within 10 days, bank was entitled to repossess on default in making payments. *Citizens Nat'l Bank v. Osetek*, 353 F. Supp. 958 (S.D.N.Y. 1973).

For "perfection" purposes under Florida law secured party's lien on after-acquired goods arose at time financing statement was filed, and transfer of such goods must be deemed as having occurred on that date for purposes of bankruptcy statute's provision as to preferential transfers subject to avoidance. *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327 (N.D. Fla. 1972), *aff'd*, 486 F.2d 1401 (5th Cir. Fla. 1973).

13. Upon compliance with certificate of title laws.

Since Illinois vehicle Code provided exclusive means of perfecting and giving notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

The security interest of a seller under an installment contract for the sale of a truck was perfected by a notation of the

encumbrance on the certificate of title to the truck, pursuant to statute, and the perfected security interest was effective against the insolvent buyer's receivers in equity. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

14. Priority of subsequent liens.

Under UCC § 9-301, security interest of cattle seller was subordinate to rights of garnishing lien creditor where debtor purchased cattle from seller and paid for them with check which was subsequently dishonored for insufficient funds, where debtor shipped cattle to livestock auction company for resale and writ of garnishment was served on auction company, where seller and debtor subsequently executed security agreement and financing statement, back-dated, and properly describing cattle in question and where financing statement was filed within ten days after debtor purchased cattle from seller. Seller's right to reclaim under UCC § 2-702 was not security interest within purview of Article 9 on secured transactions and acceptance of check did not change cash sale into credit transaction. Since there was no security agreement between debtor and seller, either oral or written, at time writ of garnishment was served, security interest attached sometime later when security agreement was signed by debtor. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), *ref. n.r.e.* (Apr. 7, 1976).

Although bank's financing statement on debtor's accounts receivable was on file with secretary of state at time subsequent creditor agreed to finance same accounts, bank would be estopped from asserting priority of its security interest where, upon being questioned, bank president stated that bank had security interest in furniture, fixtures, equipment and inventory of debtor corporation, but did not inform subsequent creditor of any security interest in accounts receivable held by bank. *Manson State Bank v. Diamond*, 227 N.W.2d 195 (Iowa 1975).

While, by virtue of §§ 9-303(1) and 9-204(1), a security interest in after-acquired inventory items may not be fully perfected until it attaches to items as and

when they are acquired by the debtor, nevertheless § 9-204(3) recognizes that a lien in such inventors items can be created by a security agreement and such a lien, if filing requirements are complied with, is superior to a subsequently acquired contract creditor's lien or other third party claims except those of buyers in ordinary course of business under § 9-307(1) and holders of perfected purchase money security interests under § 9-312(3). *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

The title of a conditional vendor to removable fixtures installed upon realty is superior to the lien of a prior mortgage containing the standard "after-acquired property" clause, but a conditional vendor is bound to refrain from wilfully impairing the security of a real estate mortgagee and if, without the consent of the mortgagee, he removes equipment subject to the mortgage, he should be required to account to the mortgagee for its fair value, and if the equipment which was replaced without the mortgagee's consent was serviceable and of some value, the priorities must appropriately be reversed to the extent of the impairment of the mortgagee's security. *Blancob Constr. Corp. v. 246 Beaumont Equity, Inc.*, 23 A.D.2d 413 (1st Dep't 1965).

Accounts receivable which the creditor agreed in 1957 to assign to the bank as they became due from the United States government fell within the clause covering "all future accounts receivable submitted" contained in a 1955 financing statement filed by the bank, so that the interest of the bank, as the secured party, was superior to that of the receiver in bankruptcy in a 1958 proceeding, and any funds which had been placed in the hands of the bank pursuant to the assignment did not have to be turned over to the receiver. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

Where debtor and lender bank entered into a security agreement granting the bank a security interest in debtor's merchandise inventory which the bank perfected by filing, and thereafter the Commonwealth filed unemployment compensation claims against the debtor,

thereby fixing liens upon all of debtor's real and personal property, and landlord levied a distraint for rent against the debtor's property, and the bank instituted an action of replevin with bond of debtor's goods subject to bank's security interest, and on same day debtor filed a petition for arrangement which was subsequently converted into bankruptcy proceeding, and bankruptcy court restrained execution of writ of replevin, the order of distribution would be (1) costs of administration, (2) wages, (3) liens of Commonwealth, (4) lien of landlord, and (5) bank's lien. *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. Pa. 1959).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by an automobile dealer who for automobiles used as demonstrators executed installment sales contracts as both seller and buyer, and the bank subsequently accepted an assignment of such installment contracts, which in effect substituted them for the original financing arrangement, the filing of a financing statement with respect to the wholesale credit plan was ineffective to make the bank's security interest under the installment contracts a perfected interest as against the receiver in equity of the dealer. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

The security interests of the seller of equipment for a butcher business and a retail grocery store were subordinate to that of the buyers' trustee in bankruptcy where the seller did not file copies of the contracts in the office of the Secretary of the Commonwealth until after the buyers were adjudicated bankrupt, although copies were filed in the office of the prothonotary of the county wherein the buyers conducted their business. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

15. Continuity.

Where bank had security interest in furniture dealer's after-acquired inventory, dealer acquired certain inventory from manufacturer, and manufacturer provided delivery of items in its own trucks, at its own risk, and all sales were for cash on delivery, dealer acquired rights

in collateral when it was delivered and, thus, bank's security interest attached at that point under UCC § 9-204(1), was perfected upon delivery under UCC § 9-303, and took priority over statutory landlord's lien which attached at same time. *National Inv. Trust v. First Nat'l Bank*, 88 N.M. 514, 543 P.2d 482 (1975).

When the debtor does acquire more property of the type referred to in the financing statement already on file, and when a security interest attaches to that property, the perfection is instantaneous and automatic. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 288-509.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:541-9:544 (when

interest perfected; continuity of perfection).

CJS. 79 C.J.S., Secured Transactions §§ 51, 52.

§ 75-9-309. Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in Section 75-9-311(b) with respect to consumer goods that are subject to a statute or treaty described in Section 75-9-311(a);

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) A sale of a payment intangible;

(4) A sale of a promissory note;

(5) A security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;

(6) A security interest arising under Section 75-2-401, 75-2-505, 75-2-711(3), or 75-2A-508(5), until the debtor obtains possession of the collateral;

(7) A security interest of a collecting bank arising under Section 75-4-210;

(8) A security interest of an issuer or nominated person arising under Section 75-5-118;

(9) A security interest arising in the delivery of a financial asset under Section 75-9-206(c);

(10) A security interest in investment property created by a broker or securities intermediary;

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; and

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate.

(14) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

SOURCES: Former 1972 Code § 75-9-309 [Codes, 1942, § 41A:9-309; Laws, 1966, ch. 316, § 9-309; Laws, 1990, ch. 384, § 53; Laws, 1996, ch. 468, § 68, eff from and after July 1, 1996] is now found in comparable provisions enacted at § 75-9-331 by Laws, 2001, ch. 495, § 1. Present § 75-9-309 was derived from former 1972 Code §§ 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996], 75-9-116 [Laws, 1996, ch. 468, § 60, eff from and after July 1, 1996], and 75-9-302 [Codes, 1942, § 41A:9-302; Laws, 1966, ch. 316, § 9-302; Laws, 1977, ch. 452, § 15; Laws, 1986, ch. 401, § 1; Laws, 1990, ch. 384, § 50; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 7, eff from and after passage (approved Mar. 20, 2002.)

Amendment Notes — The 2002 amendment added (14).

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Motor vehicle sales finance law, see §§ 63-19-1 et seq.

Security interests under motor vehicle titles law, see §§ 63-21-41 et seq.

JUDICIAL DECISIONS

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35. Multiple state transactions.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-302(1).

A. In General.

6. Generally.

In suit by debtor's receiver challenging bank's priority as perfected security interest holder and its concomitant right to take possession and dispose of secured collateral, UCC § 9-402 did not require bank to give notice to debtor's creditors that original security agreement was amended to increase amount of its loan and terms of repayment where increased loan was secured by same collateral originally described in financing statement. *Heights v. Citizens Nat'l Bank*, 463 Pa. 48, 342 A.2d 738 (1975).

This section of the Code relates to secured transactions insofar as third persons are concerned and does not determine the effect of a secured transaction as between the original debtor and the original creditor. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

Security interests based on trust receipts attached when the agreements were made, value was given, and the debtor received possession of the collateral, and the security interests were perfected when they attached. *In re United Thrift Stores, Inc.*, 242 F. Supp. 714 (D.N.J. 1965), *aff'd*, 363 F.2d 11 (3d Cir. N.J. 1966).

In an action by a trustee in bankruptcy to recover for the estate assets taken over by holders of financing contracts, wherein the contract holders, who had filed financing statements pursuant to the Uniform Commercial Code, defended on the ground that they were secured creditors, mixed questions of fact and law being involved, the matter was too complex to permit solution on motion for a summary judgment, in whole or in part. *Hurwitz v. Fidelity Am. Fin. Corp.*, 179 F. Supp. 550 (E.D. Pa. 1960).

7. Requisites of proper filing.

Where chattel mortgage on trailer was defective under UCC § 9-402(1) as filed financing statement because it lacked both address of secured party and debtor's mailing address, chattel mortgagee's security interest was unperfected under § 9-302(1), and under UCC § 9-301(1)(b), judgment lien creditor, which had obtained judgment against chattel mortgagor, executed on such judgment, and seized trailer in suit, had priority to proceeds from trailer's sale. *Cushman Sales & Serv. of Neb., Inc. v. Muirhead*, 201 Neb. 495, 268 N.W.2d 440 (1978).

For a case where the financing statements required by subsection (i) of the instant section were duly executed and filed, see *Fall River Trust Co. v. B.G. Browdy, Inc.*, 346 Mass. 614, 195 N.E.2d 63 (1964).

B. Necessity and Effect of Filing.

8. In general.

Statute providing that filing of financing statement is not required to perfect

security interest in assignments of accounts that do not transfer significant part of assignor's outstanding accounts did not apply to determination of whether unsecured debt assigned, for collection purposes only, to assignee holding secured debt arising from same transaction was secured after assignment; issue of perfection was pertinent as it related to security interests of either assignor or assignee, rather than to assignment from assignor to assignee. *W.C. Fore Trucking Co. v. Biloxi Prestress Concrete, Inc.*, 98 F.3d 204 (5th Cir. 1996).

Where neither party has perfected his security interest, UCC § 9-312(5) determines priority between conflicting interests in same collateral; thus, where plaintiff-landlord had lien on tenant's property under terms of recorded lease which was valid under UCC § 9-204(3), but which was not perfected due to plaintiff's failure to file financing statement with secretary of state as required by UCC § 9-401(1)(c), and where defendant sold bar equipment to plaintiff's tenants under conditional sales contract and acquired purchase money security interest under UCC § 9-107(a), which was not perfected under UCC § 9-302(1) since defendant failed to obtain signatures of parties as required by UCC § 9-402(1), and where defendant subsequently repossessed and sold property in question, defendant's security interest took priority over plaintiff's either under theory that defendant perfected its security interest by repossessing and selling property or under theory that defendant's security interest attached prior to plaintiff's. *Engelsma v. Superior Prods. Mfg. Co.*, 298 Minn. 77, 212 N.W.2d 884 (1973).

Failure to file financing statement under UCC § 9-302 deprives security interest of priority over federal tax lien. *Sams v. Redevelopment Auth.*, 436 Pa. 524, 261 A.2d 566 (1970).

Generally speaking a financing statement must be filed in order to protect a security interest in property not retained by the creditor. *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

Where evidence adduced by defendant, owner of four automobiles he had deliv-

ered to a dealer, failed to establish that dealer was generally known by his creditors to be substantially engaged in selling the goods of others, Georgia had no sign law of which the owner could avail himself, and owner had neither taken nor perfected a security interest, the delivery to the dealer constituted a "sale and return," and plaintiff who had advanced money to dealer and obtained from him bills of sale and trust receipts for the automobiles obtained title sufficient to support an action for trover against defendant. *Guardian Dist. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

When goods subject to a security interest are placed in the debtor's possession, the Uniform Commercial Code requires certain filings to perfect the security interest as to other creditors and third parties. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

An unrecorded security interest is not valid as against a subsequent creditor of a lessee having a judicial lien. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

Where debtor and lender bank entered into a security agreement granting the bank a security interest in debtor's merchandise inventory which the bank perfected by filing, and thereafter the Commonwealth filed unemployment compensation claims against the debtor, thereby fixing liens upon all of debtor's real and personal property, and landlord levied a distraint for rent against the debtor's property, and the bank instituted an action of replevin with bond of debtor's goods subject to bank's security interest, and on same day debtor filed a petition for arrangement which was subsequently converted into bankruptcy proceeding, and bankruptcy court restrained execution of writ of replevin, the order of distribution would be (1) costs of administration, (2) wages, (3) liens of Commonwealth, (4) lien of landlord, and (5) bank's lien. *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. Pa. 1959).

9. Future advances or the like.

A properly recorded bill of sale to secure debt on an inventory, with clauses covering future advances and acquisition of

substitute and additional inventors, executed and recorded prior to the adoption of the UCC, does not have to be filed anew under the UCC to preserve its security interest in inventory acquired by the debtor after the effective date of the UCC, and the trial court did not err in ordering the proceeds of the sale of such inventory paid to the holder of the bill of sale to secure debt rather than to holders of security interests, which were not purchase money interests, executed and delivered with filings made thereon after the effective date of the UCC. *Charles S. Martin Distrib. Co. v. First State Bank*, 114 Ga. App. 693, 152 S.E.2d 599 (1966).

10. Guarantors and sureties.

UCC does not require filing of financing statement by surety company that has executed performance bond for contractor. *National Sur. Corp. v. State Nat'l Bank*, 454 S.W.2d 354 (Ky. 1970).

Contractor's assignment of right to payment to its surety pursuant to indemnity agreement was account or contract right within meaning of UCC § 9-106 and was, as such, security interest subject to provisions of Article 9 of UCC; however, UCC §§ 9-301 and 9-302 provide that, with respect to such security interests in accounts and contract rights, any lien creditor, including judgment lien creditor, will have priority over secured interest unless financing statement has been filed; since no such financing statement was filed by surety with respect to assignment in question, its security interest remained subordinate to tax liens of United States. *American Fid. Fire Ins. Co. v. United States*, 385 F. Supp. 1075 (N.D. Cal. 1974).

Where the creditor has the protection of a security interest in collateral and the personal obligation of a guarantor, the guarantor has such interest as enables him to file a financing statement so that the creditor's interest in the collateral is perfected. *Nation Wide, Inc. v. Scullin*, 256 F. Supp. 929 (D.N.J. 1966), *aff'd*, 377 F.2d 554 (3d Cir. N.J. 1967).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the

subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid against a lien creditor, including a trustee in bankruptcy, from the date of the filing of the petition: hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

11. Subrogees.

Where there are two security interests in the same collateral, and a third person pays the debt of the debtor to the holder of the prior interest based upon order of filing, the third person, despite the fact that he did not take an assignment of the prior interest would, upon principles of subrogation, succeed to the rights of the holder of the prior interest provided that the interest of the intervening lienor was not prejudicially affected. This principle of subrogation is not superseded by the Uniform Commercial Code which provides in § 1-103 that unless displaced by the particular provisions of the Code, the principles of law and equity "shall supplement its provisions" because no provision of the Code purports to affect the fundamental equitable doctrine of subrogation. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

While the rights of a third person can rise no higher than those of the holder of the prior interest, the third person was not limited in the enforcement of its claim to the amount paid by the third person to the holder of the prior interest less amounts received by the third person from the debtor. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

12. Leases.

Where document evidencing transaction involving walk-in food freezer as titled "Contract of Sale and Agreement," parties termed themselves buyer and seller and expressed desire to consummate sale of freezer, monthly payments of "rent" were in reality interest on deferred

purchase price, transaction was conditional sale, rather than lease, and contract created security interest in seller; and since seller never filed financing statement to perfect his security interest, perfected security interest of Small Business Administration in buyer's equipment and fixtures had priority. *Witmer v. Kleppe*, 469 F.2d 1245 (4th Cir. W. Va. 1972).

Owner of equipment perfected security interest in collateral by possession thereof where, pursuant to agreement between owner and lessee, option to cancel equipment lease was exercised and lessee, acting as agent of owner, dismantled equipment, removed it from building, and placed it in vans for delivery to owner. *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969).

A lease of newspaper composing room equipment specifically stating it contained the entire agreement between the parties, providing that lessee acquired no interest in leased property except that of use, and giving lessor right to demand and take possession of property on termination of lease or in event of default was a bona fide lease, and lessor was not required to file a financing statement to preserve its right of possession after default. *In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

A lease agreement covering a machine priced at over \$8,000 which provided that the lessee might, at its option, apply the monthly rental payments up to 75 percent of the machine's value against the purchase price and upon payment of the additional 25 percent of the cost in cash obtain title to the machine is an instrument requiring more than a nominal consideration to be paid for the passage of title, is not a security interest and need not be registered or filed to be valid as a lease. *In re Wheatland Elec. Prods. Co.*, 237 F. Supp. 820 (W.D. Pa. 1964).

13. Effect of filing, generally.

Where (1) first creditor filed financing statement covering present and future inventory of motor-home retailer, (2) retailer thereafter acquired motor home from manufacturer and placed it in retailer's inventory for resale, (3) second credi-

tor made loan to retailer and filed financing statement on such motor home without determining whether any prior financing statements were on file, (4) second creditor thereafter filed application for title certificate for home, which was issued five months later and indicated that retailer was home's owner and that second creditor was first lienholder, and (5) on retailer's default on loan, second creditor filed declaratory-decree action seeking to have its lien determined to be superior to that of first creditor, court held (1) that when first creditor filed financing statement on retailer's inventory, no title certificate or manufacturer's certificate of origin was in existence and thus first creditor could only protect its lien right by filing financing statement under Florida Uniform Commercial Code, (2) that both Florida Uniform Commercial Code, in § 9-302(3)(b), and Florida Motor Vehicle Title Certificates Act provide that lien recording provisions of Uniform Commercial Code, rather than those of Motor Vehicle Title Certificates Act, govern liens on motor vehicles held as inventory, (3) that at time of second creditor's loan to retailer, second creditor knew that no title certificate had been issued, (4) that first creditor was entitled to rely on its financing statement as notice to second creditor of first creditor's prior lien, (5) that second creditor was not buyer in ordinary course of business under UCC § 9-307(1), and (6) that since second creditor was not buyer in ordinary course of business, first creditor's security interest in motor home was superior to that of second creditor. *Borg-Warner Acceptance Corp. v. Atlantic Bank*, 364 So. 2d 35 (Fla. App. 1978).

In receivership proceedings involving conflicting petitions to reclaim assets of insolvent corporation, secured party which had loaned money to insolvent and had performed every act required by law to obtain perfected security interest in all of insolvent's receivables, including filing of financing statement pursuant to UCC §§ 9-302(1), 9-304(1), and 9-402(1), had priority over all unsecured general creditors, including investors in the insolvent corporation who held debentures and notes which stated on their face that they were subordinate to claims of all other

contract creditors. *Coastal Fin. Corp. v. Coastal Fin. Corp.*, 120 R.I. 317, 387 A.2d 1373 (1978).

In interpleader proceeding to establish priority of claims to money due and payable to debtor under general agency contract, UCC § 9-104 exemption from coverage of article 9 of claims for wages, salary, or other compensation of employee was inapplicable where debtor was independent contractor; creditor who had obtained perfected security interest in debtor's commissions had first priority against funds, while rights of creditor who had failed to perfect its security interest as required by UCC § 9-302 were subordinated to rights of those who qualified as lien creditors under UCC § 9-301; burden of proof as to whether lien creditors had knowledge of unperfected security interest rested on holder of unperfected security interest. *Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank*, 372 F. Supp. 1027 (E.D. Pa. 1974), *aff'd sub nom.* *In re Franklin Nat'l Bank*, 510 F.2d 969 (3d Cir. Pa. 1975), *aff'd*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Mercantile Financial Corp.*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Miller*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Mokrin*, 510 F.2d 970 (3d Cir. Pa. 1975).

Where petitioner's security interest was perfected by proper filing, it thereupon took priority over all unfilled and unperfected interests, including the rights of judgment creditors who thereafter issued execution, since under Rule 5202(a) CPLR such creditors are perfected only by the issuance of execution; and, upon default in payments due on the indebtedness secured by the interest, petitioner became entitled to immediate possession of the collateral under the provisions of § 9-503. *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821 (1967).

A chattel mortgage creates a security interest when it has been appropriately filed. *In re Kelley*, 54 Berks C.L.J. 106 (Pa.).

14. Protection of buyers in ordinary course.

An acceptance company which had made loans to a dealer was required to look to the dealer for repayment, rather

than to a new automobile in possession of one who had purchased it from the dealer in the ordinary course of business, paying the full purchase price therefor, notwithstanding that the acceptance company had filed a blanket security agreement executed by the automobile dealer, who had also executed and delivered to the acceptance company a trust receipt agreement describing the automobile in question. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

Where notwithstanding that buyer who bought an automobile from the dealer out of inventory and in ordinary course of business had paid the full purchase price, the dealer thereafter fraudulently executed a collateral mortgage with the identical automobile as security in favor of a bank with whom dealer had an existing floor plan agreement, the transaction between the dealer and the bank was void as to the buyer. *Weisel v. McBride*, 191 Pa. Super. 411, 156 A.2d 613 (1959).

C. Statutory Exceptions.

15. In general; collateral in secured party's possession.

In replevin action brought by finance company against garage owner, trial court erred in giving priority to finance company's chattel mortgage where it was not shown that such chattel mortgage had been perfected by filing and where, on other hand, garage owner had perfected his interest in automobile since he had possession of it. *Henson v. Government Emp. Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974).

The filing of a financing statement is unnecessary to perfect a security interest in United States coins having a numismatic value in excess of their face value, pledged with and delivered to a bank as collateral for a loan; for such coins are to be considered as "goods" rather than as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), *aff'd*, 387 F.2d 118 (8th Cir. Mo. 1968).

16. Beneficial interest in trust or estate.

Absent a filing in accordance with § 91-9-3, a trustor's assignments to the trustee of interest in real or personal property

owned by the trust, were insufficient to attach a lien to the real property assets of the trust. Section 75-9-302(1)(c), which provides an exception to the filing requirement for a security interest created by an assignment of a beneficial interest in a trust, does not apply to liens on real property. *Merchants Nat'l Bank v. Bank of Miss.*, 584 So. 2d 433 (Miss. 1991).

Although beneficial interest in land trust is personal property under Illinois law, where (1) decedent assigned beneficial interest in land trust to bank as collateral for loan, and (2) bank was trustee of such trust and had both equitable and legal title to trust res, bank had interest in real estate that was exempt from provisions of UCC Art 9, including UCC § 9-302 dealing with perfection of security interests by filing, and bank therefore was not liable for conversion of decedent's beneficial interest in such trust by proceeding in accordance with probate court's order concerning sale of trust res to satisfy claims of estate creditors, including that of bank. *In re Estate of McGaughey*, 60 Ill. App. 3d 150, 376 N.E.2d 259 (1st Dist. 1978).

17. —Prior to 1977 amendment.

Mortgagee failed to perfect its interest in land trust so as to entitle it to priority over mortgagors' judgment creditors, who established their claim to beneficial interest in trust by availing themselves of remedy of citation proceedings, where mortgagee delayed for over two years in filing financing statement with secretary of state as required under UCC § 9-302. *Mid-West Nat'l Bank v. Metcoff*, 23 Ill. App. 3d 607, 319 N.E.2d 336 (2d Dist. 1974).

18. Purchase money security interest; consumer goods.

Under Mississippi law, filing of financing statement is not required in order to perfect purchase money security interest in consumer goods. *In re Shaw*, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

Under Mississippi law, absent filed financing statements, furniture company's claims against three Chapter 13 debtors for balance due on household goods and furnishings were only secured to extent they represented purchase money secu-

rity interests. In re Shaw, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

Watches and rings were “consumer goods” within the meaning of subsection (1)(d) of this section; assignment of security interest did not modify character of transaction as purchase-money transaction. In re Boykins, 120 B.R. 71 (Bankr. N.D. Miss. 1990).

UCC § 9-302(1)(d), which as an exception to the filing requirements of UCC § 9-302(1) provides that a purchase-money security interest in consumer goods is perfected without filing, is not unconstitutional (1) on the ground that it violates equal protection by not providing for a rational classification or (2) on the ground that it violates due process by not providing notice by filing. A purchase-money security interest in consumer goods is a rational classification, and the existence of the exception is sufficient to put subsequent creditors on notice. Personal Thrift Plan of Perry, Inc. v. Georgia Power Co., 242 Ga. 388, 249 S.E.2d 72 (1978).

Where debtor purchased stereo on credit and granted creditor security interest, where security agreement granted creditor security interest in “each item of merchandise purchased or hereafter purchased,” but also provided that, in case of items purchased on different dates, item first purchased would be deemed paid for first, and where debtor subsequently purchased freezer under same arrangement, signing another agreement with same language, creditor had perfected the security interest in both stereo and freezer under UCC § 9-302, although creditor did not file financing statements; creditor’s security interest in stereo by explicit terms of agreement was to terminate as soon as purchase price of stereo was paid and, since collateral secured only debt representing its price, security agreement created purchase money security interest in consumer goods which did not need to be filed in order to be perfected. In re Staley, 426 F. Supp. 437 (M.D. Ga. 1977).

Where debtors purchased from creditor, on credit, household appliances and goods, granting security interest to creditor, where security agreement clearly provided that, so long as any indebtedness

was outstanding, property stood as collateral not only for its price but also for price of property subsequently acquired on credit, and where debtors subsequently purchased vacuum cleaner and added it to their account with creditor, signing another financing statement, creditor did not have purchase money interest in property purchased on first sale and, therefore, exception from filing requirement provided for purchase money security interest in consumer goods under UCC § 9-302 did not apply; having failed to file financing statement, creditor did not have perfected security interest and, therefore, did not have secured claim against property in bankruptcy proceeding. In re Norrell, 426 F. Supp. 435 (M.D. Ga. 1977).

Furniture dealer with security interest in household furniture and TV set purchased by bankrupt debtor could not claim perfected security interest in such goods under exception from filing requirements for consumer goods contained in UCC § 9-302(d) where security agreement covered items purchased at different times with no information as to which items were paid for and which were not; furniture dealer’s interest was not “purchase money security interest” since it was not taken or retained by dealer solely to secure all or part of collateral’s price. In re Manuel, 507 F.2d 990 (5th Cir. Ga. 1975).

Where defendant pawnshop purchased television sets from debtor who was not in business of selling television sets, and later resold them, defendant pawnshop was liable to secured party with purchase money security interest, despite fact that security interest was never recorded. White-Sellie’s Jewelry Co. v. Goodyear Tire & Rubber Co., 477 S.W.2d 658 (Tex. Civ. App. 1972).

A guitar and amplifier primarily used by the purchaser to perform in night clubs are “equipment” and not “consumer goods,” and consequently the seller’s security interest must be perfected to be enforceable against a person to whom the instruments were subsequently pawned. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

A conditional sales contract is a valid security interest, analogous to a chattel mortgage, and when it is executed prior to

the making of a federal tax assessment against the conditional vendee it is prior thereto and its filing is unnecessary as against the United States. *United States v. Lebanon Woolen Mills Corp.*, 241 F. Supp. 393 (D.N.H. 1964).

"Conditional sales contract note" covering furniture, furnishings and carpeting sold to a non-profit corporation was not excluded from filing requirements. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

Since a household laundry dryer is within the definition of "consumer goods," a purchase money security interest therein may be perfected without the filing of a financing statement. *United Gas Imp. Co. v. McFalls*, 18 Pa. D. & C.2d 713 (1959).

19. —Motor vehicles.

A lender's attached purchase money security interest in an automobile dealership's inventory of used vehicles was not properly perfected under the Mississippi Motor Vehicle Title Law where the lender never filed a financing statement. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937 (Miss. 1990).

Where (1) first creditor filed financing statement covering present and future inventory of motor-home retailer, (2) retailer thereafter acquired motor home from manufacturer and placed it in retailer's inventory for resale, (3) second creditor made loan to retailer and filed financing statement on such motor home without determining whether any prior financing statements were on file, (4) second creditor thereafter filed application for title certificate for home, which was issued five months later and indicated that retailer was home's owner and that second creditor was first lienholder, and (5) on retailer's default on loan, second creditor filed declaratory-decree action seeking to have its lien determined to be superior to that of first creditor, court held (1) that when first creditor filed financing statement on retailer's inventory, no title certificate or manufacturer's certificate of origin was in existence and thus first creditor could only protect its lien right by filing financing statement under Florida Uniform Commercial Code, (2) that both Florida Uniform Commercial Code, in

§ 9-302(3)(b), and Florida Motor Vehicle Title Certificates Act provide that lien recording provisions of Uniform Commercial Code, rather than those of Motor Vehicle Title Certificates Act, govern liens on motor vehicles held as inventory, (3) that at time of second creditor's loan to retailer, second creditor knew that no title certificate had been issued, (4) that first creditor was entitled to rely on its financing statement as notice to second creditor of first creditor's prior lien, (5) that second creditor was not buyer in ordinary course of business under UCC § 9-307(1), and (6) that since second creditor was not buyer in ordinary course of business, first creditor's security interest in motor home was superior to that of second creditor. *Borg-Warner Acceptance Corp. v. Atlantic Bank*, 364 So. 2d 35 (Fla. App. 1978).

Under UCC § 9-302(1)(d), a valid financing statement, properly filed, perfects a security interest in a motor vehicle. Until that time, under UCC § 9-301(1)(c), a buyer not in the ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the unperfected security interest, takes free of such interest. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

A mobile home is a motor vehicle within the meaning of this section which requires that a financing statement must be filed to perfect a security interest therein. *Recchio v. Manufacturers & Traders Trust Co.*, 35 A.D.2d 769 (4th Dep't 1970).

The holder of a security interest in an automobile purchased for personal, family, or household purposes need not file any statement of his security interest in order to preserve that interest against the claims of third persons. *National Shawmut Bank v. Corcoran Motor Sales Co.*, 47 Mass. App. Dec. 72 (1971).

The holder of a purchase money security interest in an automobile which qualified as "consumer goods" is not required to file a financing statement in order to assert successfully such interest against third persons. *Rockland Credit Union, Inc. v. Gauthier Motors, Inc.*, 39 Mass. App. Dec. 180 (1967).

Under Massachusetts version of Code § 9-302(1)(d) omitting filing requirement

for licensed motor vehicles, neither filing nor any step, other than execution and delivery of conditional sales contract, was necessary to make security interest attach in automobile purchased as “consumer goods”. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

Under (1)(d) of the instant section which deliberately omitted a provision of the official code draft excluding automobiles from the exception of consumer goods, filing is not required in Massachusetts to perfect a purchase money security interest in consumer goods, including automobiles, under § 9-303 the interest became perfected when it attached, and where an automobile was purchased under a conditional sale contract, nothing other than the execution and delivery of the contract was necessary to make the security interest attach. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

A house trailer is a motor vehicle within the meaning of the Uniform Commercial Code provision requiring filing with respect to motor vehicles which are to be licensed or registered in this state, and therefore mortgagee who perfected his security interest by filing the same was entitled to possession of a trailer as opposed to the owner of a retail instalment contract whose filing had expired prior to the mortgagee's perfecting of his security interest. *Albany Disct. Corp. v. Mohawk Nat'l Bank*, 54 Misc. 2d 238 (1967), modified on other grounds, 30 A.D.2d 623, 290 N.Y.S.2d 576 (3d Dep't 1968), on reargument, 30 A.D.2d 919, 292 N.Y.S.2d 300 (3d Dep't 1968), aff'd, 28 N.Y.2d 222, 321 N.Y.S.2d 94, 269 N.E.2d 809 (1971).

Where the conditional buyer of an automobile warranted and covenanted on the face of the security instrument that it was bought and used primarily for personal, family or household purposes, the trial court correctly ruled that the vehicle was consumer goods to which the filing provisions of Article 9 did not apply. *Natick Trust Co. v. Bay State Truck Lease, Inc.*, 28 Mass. App. Dec. 60 (1963).

Automobiles delivered by an automobile manufacturer to its authorized dealer, with a reservation of title until actual payment therefor, were not “consumer

goods” which would relieve the manufacturer, as the holder of a security interest, from the requirement of perfecting its security interest in order to take priority over a lien creditor. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

20. —Fixtures.

A security interest in equipment fixtures is perfected by filing a financing statement. *In re Lux's Superette, Inc.*, 206 F. Supp. 368 (E.D. Pa. 1962).

21. —Equipment.

Although it had been orally agreed between buyer and seller that delivery of machine was not to be made except upon payment, such agreement as to delivery and payment was modified or waived by seller, and buyer became credit buyer, when manufacturer mistakenly shipped machine to buyer and seller forwarded invoice requiring payment “net in 30 days”; consequently, buyer acquired rights in machine and seller's unperfected purchase money security interest became subordinate to lender's security interest in buyer's after-acquired “equipment.” *Galleon Indus., Inc. v. Lewyn Mach. Co.*, 50 Ala. App. 334, 279 So. 2d 137 (Civ. App. 1973), cert. denied, 291 Ala. 779, 279 So. 2d 142 (1973).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

Guitar and amplifier primarily used to perform in night clubs were “equipment” within Code § 9-109(2), and not within Code § 9-302(1)(d) consumer goods exception to Code filing requirements. *Strevel-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

The filing of a financing statement or a copy of the contract of sale was necessary under this section to perfect the seller's security interest in the instalment sales of equipment for a butcher business and a retail grocery store. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

22. —Farm equipment (prior to 1977 amendment).

Pursuant to FS § 679.302(1)(c), no filing is required with respect to the sale of several separate items of farm equipment, each costing less than \$2500, even though when totaled under one contract, the price of the items exceeded \$2500. *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32, 85 A.L.R.3d 1015 (1974), but see *In re Outrigger Club, Inc.*, 6 B.R. 78 (Bankr. S.D. Fla. 1980); *Regan v. ITT Industrial Credit Co.*, 469 So. 2d 1387 (Fla. Ct. App. 1984); *ITT Industrial Credit Co. v. Regan*, 487 So. 2d 1047 (Fla. 1986).

Haybine, designed and marketed for purpose of mowing and conditioning hay, was bought by retail business owner for commercial haycutting and baling; held, machine was, at all material times, "farm equipment" within Code exemption of filing requirement. *Citizens Nat'l Bank v. Sperry Rand Corp.*, 456 S.W.2d 273 (Tex. Civ. App. 1970), writ ref'd n.r.e., (Oct. 7, 1970).

Farm equipment is classified as consumer goods. *Lonoke Prod. Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964).

23. Assignment of accounts.

Defendant finance company did not acquire security interest in two vehicles superior to that of plaintiff bank, by virtue of automobile dealer's execution and filing of inventory security agreements in favor of the defendant covering vehicles, where vehicles had originally been sold by dealer and conditional sales contracts were assigned to plaintiff subject to recourse contract with dealer, where plaintiff had at all times had possession of certificates of ownership for vehicles and was listed as legal owner thereon, where dealer had possession of vehicles as result of their repossession by plaintiff pursuant to recourse agreement following purchasers'

defaults, and where plaintiff had demanded, unsuccessfully, that dealer pay balance due on conditional sales contracts as provided by recourse agreement; under UCC § 9-204, dealer, as debtor, did not acquire rights in subject motor vehicles sufficient to transfer valid security interest to defendant; nor could defendant, by advancing flooring money to dealer be considered buyer in ordinary course of business, but was rather financing agency only, excluded from protection created by UCC § 9-307. *Mother Lode Bank v. GMAC*, 46 Cal. App. 3d 807 (3d Dist. 1975).

Assignee (from 1st assignee) of assigned claim steps into shoes of his assignor as to priorities, even if latter assignee makes no new filing. *Grise v. White*, 355 Mass. 698, 247 N.E.2d 385 (1969).

Factoring company, to whom an attorney assigned fees to be received from a certain client, which failed to perfect its security interest by filing a financing statement was subordinated to the rights of another lawyer who, with no knowledge of the prior assignment, became entitled to receive the fees by reason of an agreement with the assigning attorney. *In re Cohen's Estate*, 38 Pa. D. & C.2d 777 (1966).

A letter written by a subcontractor to his general contractor advising the latter of the assignment of his account for work performed to a bank, the written acceptance of the letter by the addressee, and the fact that the bank loaned money to the subcontractor taking the letter assignment as collateral created a valid security interest which did not have to be perfected by the filing of a financing statement. *Citizens & S. Nat'l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965).

Under subsection (2) of the instant section, a security interest can be "assigned" to another creditor without loss of its priority even if no filing is made. Thus, where the order of priority under § 9-312(5)(a) among three creditors is A, B, and C, and A assigns his security interest to C, it would follow that C would acquire A's priority over B. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by an automobile dealer who for automobiles used as demonstrators executed installment sales contracts as both seller and buyer, and the bank subsequently accepted an assignment of such installment contracts, which in effect substituted them for the original financing arrangement, the filing of a financing statement with respect to the wholesale credit plan was ineffective to make the bank's security interest under the installment contracts a perfected interest as against the receiver in equity of the dealer. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

24. —“Significant part” distinguished.

Assignee of contract rights in motion picture film was required to file financing statement under UCC § 9-302(1)(e) absent evidence that such assignment was insignificant part of outstanding accounts or rights of assignor; party claiming exemption from filing requirement under UCC §§ 9-302(1)(e) had burden of proving that assignment came within scope of statutory exemption and fact that assignment may have been isolated or casual transaction was not proper test. *Consolidated Film Indus. v. United States*, 547 F.2d 533 (10th Cir. Utah 1977).

Letter allegedly establishing assignment of foreign exchange contract rights to bank did not measure up to security agreement under UCC since it failed to contain “description of the collateral” as required by § 9-203(1)(a). Moreover, bank failed to file financing statement, as required by §§ 9-302(1) and 9-303 and, thus, failed to obtain valid and perfected assignment of contract rights. Purported assignment was not exempt from filing under UCC § 9-302(1)(e) since, at time assignee allegedly assigned contract worth \$1,000,000, assignee's total “outstanding accounts or contract rights” were \$4,439,000; thus, assignment transferred just under 20 percent of assignee's accounts, including assigned contract right, which constituted “significant part” of assignee's outstanding accounts, especially in view of high absolute value of transaction at issue. *Miller v. Wells Fargo Bank*

Int'l Corp., 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. N.Y. 1976).

Total of accounts receivable amounted to 16% of debtor's outstanding accounts receivable; amount of account assigned was slightly over \$3,000 out of total accounts receivable of \$19,000; held, assignment of accounts receivable was not significant part of debtor's outstanding accounts receivable and therefore no financing statement was required to be filed to perfect security interest therein. *Standard Lumber Co. v. Chamber Frames, Inc.*, 317 F. Supp. 837 (E.D. Ark. 1970).

Where assignment transferred significant part of outstanding contract rights to bank, bank was required to file financing statement in order to perfect its security interest under UCC § 9-302, and, where bank failed to perfect security interest until after filing and recording of materialmen's liens, bank was not entitled to priority over liens under UCC § 9-310. *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974).

Casual or isolated transfer of accounts receivable, taken by one who was not regular assignee thereof but by one who was acting at assistance of accountant, was within exception to requirement of filing of financing statement, since transfer was not as to “a significant part of the outstanding accounts”. *Abramson v. Printer's Bindery, Inc.*, 440 S.W.2d 326 (Tex. Civ. App. 1969).

25. —Contract rights (prior to 1977 amendment).

To obtain priority over federal tax lien, assignment of royalty rights in showing of movie should have been perfected by filing of financing statement, unless it could be shown that at time of assignment substantial contract rights were outstanding within the meaning of (former) subd. (1)(e). *Consolidated Film Indus. v. United States*, 547 F.2d 533 (10th Cir. Utah 1977).

Assignments of contract rights were casual and isolated, and thus were exempt from filing requirement under UCC § 9-302(1)(e) and were perfected at time of assignment, where assignee was wholesaler of wood products and was not in

business of commercial financing or obtaining assignment and where, although assignee had in past few years occasionally taken an assignment as payment for materials supplied, it did not regularly take assignments of any debtors' accounts or contract rights. *Architectural Woods, Inc. v. State*, 88 Wash. 2d 406, 562 P.2d 248 (1977).

Where creditor's assignment of debtor's right to receive payments of proceeds of construction contracts involved over one third of unearned portion of proceeds, and where creditor was engaged in regular business of interim financing, creditor's assignment of contract rights did not qualify for filing exemption of UCC § 9-302(1)(e); thus, where one creditor took assignment of debtor's right to receive payment of proceeds of construction contracts but did not file financing statement, and where subsequent creditor obtained security interest covering same collateral and filed financing statements pursuant to UCC § 9-302, junior but perfected security interest had priority over senior but unperfected security interest. *H. & Val J. Rothschild, Inc. v. Northwestern Nat'l Bank*, 309 Minn. 35, 242 N.W.2d 844, 85 A.L.R.3d 1043 (1976).

Under UCC § 9-302(1)(e) there was exemption from filing requirement for contract right and account where amount at issue did not constitute a significant part of subcontractor's receivable, where assignment was isolated event under SBA arrangement. *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid against a lien creditor, including a trustee in bankruptcy, from the date of the filing of the petition: hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into

court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

26. —General intangibles.

Assignment of portion of expected recovery of pending lawsuit given as security for loan and accounting services was not assignment of "account" or "contract right," but was more aptly categorized as assignment of "general intangible," which would not be perfected until filing of financing statement. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

California has a unique exception in UCC § 9-302(1)(g) which makes it unnecessary to file a financing statement to perfect a security interest in "general intangibles"; assignee first giving notice to third party debtor in writing thereby perfects such interest; this California exception is not void because in conflict with Section 60 of the Bankruptcy Act. *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

Lien obtained through attachment execution on partnership interest, after defendant had allegedly assigned interest to his attorney as collateral for fees and costs, took priority over rights of attorney-assignee; partnership interest came within definition of "general intangible" under UCC § 9-106, security interest therein was clearly within scope of security interests governed by article 9 of code under UCC § 9-102, and, inasmuch as no financing statement was filed under UCC § 9-302, such security interest was unperfected and plaintiff's lien, obtained through attachment execution, took priority under UCC § 9-301 over rights of defendant's attorney as holder of unperfected security interest of which plaintiff had no knowledge. *Med-Mar, Inc. v. Dilworth*, 96 Montg. County L. Rep. 91 (Pa. 1972).

27. Collecting bank.

Bank claiming security interest in sum on deposit with bank in joint account of homeowners and Farmers Home Administration had not brought itself with exception to need for filing financing statement within UCC § 9-302(1) where bank had no setoff against either of these par-

ties, where there was no assignment transferring the deposit, where the bank did not have “possession” of the deposit within UCC § 9-305, and where the bank had no lien priority against the deposit. *Craig v. Gudim*, 488 P.2d 316 (Wyo. 1971).

28. Assignment for benefit of creditors, or the like.

Where security interest was perfected by filing a financing statement, but no continuation statement was filed, effectiveness of original statement lapsed five years after initial filing and, as result, security interest became unperfected under UCC § 9-403(2), (3); however, lapse of effectiveness of financing statement, while vitiating perfection, had no effect on viability of security agreement itself; thus, where secured party took possession of collateral one day before debtor executed assignment for benefit of creditors, taking of possession by secured party constituted perfection of security interest under UCC §§ 9-302(1)(a), 9-305 and 9-503 which rendered it superior to right therein of assignee. *Rosner v. Plaza Hotel Assocs.*, 146 N.J. Super. 447, 370 A.2d 41 (App. Div. 1977).

29. Assignment of perfected interest.

Where contractor assigned accounts receivable from defendant gas company to bank as permitted by UCC §§ 9-102(1)(a) and 9-204(3), and security interest was perfected under UCC §§ 9-302 and 9-401(1)(c), defendant was liable to bank for loss suffered by failure of defendant to honor security agreement by making checks payable to contractor rather than bank. *Bank of Commerce v. Intermountain Gas Co.*, 96 Idaho 29, 523 P.2d 1375 (1974).

30. United States laws and treaties.

Federal Aviation Act (49 USCS §§ 1401 et seq.) preempts UCC § 9-307(1), dealing with rights of buyers in ordinary course of business, and renders properly registered security interest in airplane enforceable against buyer in ordinary course of business who subsequently purchases such plane. *O'Neill v. Barnett Bank*, 360 So. 2d 150 (Fla. App. 1978).

Provision in security agreement executed on purchase of new automobile

which provided that until indebtedness was fully paid, “seller has and shall retain title to and a security interest in the property” did not violate federal Truth-in-Lending Act and Regulation Z, since (1) Uniform Commercial Code, in UCC § 1-201(37), now provides universal definition of term “security interest,” (2) Uniform Commercial Code was designed to replace confusingly numerous security devices that prevailed under pre-Code practice, and (3) it would therefore be anomalous and counterproductive of UCC objectives to interpret Regulation Z, which requires disclosure of “type of any security interest held,” as requiring lender to specify particular security device employed. In such case, it was sufficient that security agreement in issue contained reference to a “security interest” in property described in the agreement that was enforceable under the Uniform Commercial Code, and statement in the agreement that seller retained “title” to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender’s disclosure statement confusing or misleading. *Drew v. Flagship First Nat’l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977).

Recording provisions of Federal Aviation Act preempt recording provisions of state law (UCC § 9-302) relating to recording of security interest in aircraft, but other provisions of state law relating to validity and priority of security interest, and remedies available to holders thereof, are not preempted. *Feldman v. Philadelphia Nat’l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976).

Creditor’s security interest in accounts of joint venture attached under UCC § 9-204 but was not perfected under UCC § 9-302(1) and was subordinated to federal tax lien where only financing statement filed covered earlier loan to one joint venturer and did not give notice to potential creditors of joint venture that security interest was in existence against joint venture. *United States v. Merchants & Marine Bank*, 292 So. 2d 151 (Miss. 1974).

31. State certificate of title laws.

Where the certificate of title of an automobile contained a notation of the creditor’s encumbrance, the notation complied

with paragraph (b) of subdivision (3) of this section, although the creditor never had possession of the car. *Harry Cramer, Inc. v. Morris*, 37 Pa. D. & C.2d 747 (1965).

The Uniform Commercial Code does not apply to perfecting liens or encumbrances or security interest in motor vehicles in view of the fact that the legislature, under the Vehicle Code, had set up an elaborate and comprehensive system for the issuance of certificates of title for motor vehicles, for the central filing of such certificates of title and for the procedure to be followed in perfecting security interest therein. *Union Nat'l Bank & Trust Co. v. Geyer Auction, Inc.*, 18 Pa. D. & C.2d 98 (1958).

The filing of a financing statement was not required under this section to perfect a security interest in a truck, where the encumbrance was noted on the title certificate to the truck, in accordance with a statute providing for a statement on the certificate of title of liens or encumbrances on the vehicle and making such notations adequate notice to creditors. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

32. —Collateral entrusted to merchant.

In action by lender to establish security interest in mobile homes "floor-planned" for dealer, (1) where lender pursuant to written agreement advanced money to dealer in Arizona for inventory financing, agreement gave lender security interest in all of dealer's present and after-acquired inventory, and lender filed financing statement with Arizona secretary of state; (2) where Alabama manufacturer thereafter orally sold 16 mobile homes to dealer but was not paid therefor, invoice accompanying such homes stated that title thereto could be transferred only through manufacturer's certificate of origin, and manufacturer retained all such certificates; (3) where manufacturer did not file financing statement evidencing its interest in such homes with Arizona secretary of state; and (4) where Arizona motor-vehicle registration code, at time of sale of homes to dealer, exempted them from registration requirement while they were still owned by dealer or manufacturer, plaintiff lender (1) was not required to file financing state-

ment and certificates of title to homes with Arizona motor-vehicle division in order that lender's lien could be indorsed on such certificates and lender's security interest in dealer's inventory could be perfected; (2) lender's security interest in homes was perfected merely by filing financing statement with Arizona secretary of state pursuant to UCC § 9-302(1) and UCC § 9-401; (3) manufacturer, by retaining title to homes, merely reserved unperfected purchase-money security interest therein under UCC § 2-401; and (4) lender's perfected security interest in homes had priority over manufacturer's unperfected security interest therein under UCC § 9-301. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

Where automobile manufacturer, who had delivered automobiles to its authorized dealer with reservation of title until paid for, failed to file a financing statement, its unperfected security interest was subordinate to the interest of a receiver for the dealer who had the status of a lien creditor without notice of such unperfected security interest. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

33. —Foreign state certificate of title laws.

Bank which loaned money to debtor to buy mobile home, and which failed to get its lien noted on bill of sale for such home with result that lien was not noted on any certificate of title to home until second certificate of title was issued one day before debtor filed petition in bankruptcy, did not do all that it could have done, under Kansas version of 1972 amendment to Official UCC § 9-302(3), to perfect its security interest in home, and thus trustee in bankruptcy, and not bank, was entitled to home. *Lentz v. St. Mary's State Bank*, 443 F. Supp. 219 (D. Kan. 1977).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not

required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973).

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978).

A bank which had filed its financing statement with the New Jersey Secretary of State had perfected its security interest in five items of self-propelled earth moving equipment, although it had not filed a

financing statement with the Director of Division of Motor Vehicles, an act required by state statute as a condition precedent to the perfection of a security interest in "motor vehicles" (a term defined in the statute to include self-propelled earth moving equipment), the court holding that despite the statutory definition, the term "motor vehicle" was not intended to embrace machines which normally operate at construction sites even though literally they perhaps can be used to transport persons on a highway. *In re Ferro Contracting Co.*, 380 F.2d 116 (3d Cir. N.J. 1967), cert. denied, 389 U.S. 974, 88 S. Ct. 475, 19 L. Ed. 2d 466 (1967).

By virtue of the provisions of subsec. (3), the filing provisions of Article 9 have no application to motor vehicles in the State of Georgia required to be registered under the Motor Vehicles Certificate Title Act. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

34. Other state laws.

Statute which merely provided means to enable holder of lien on liquor license to receive notice from State Division of Beverage in event action was taken that might affect license's continued existence, and which did not necessarily give such notice to entire world, was not substitute central filing system within meaning of Florida UCC § 9-302(3)(b), so as to enable bank's security interest in debtor's liquor license to be deemed to have been perfected at date debtor's petition for bankruptcy was filed and thus to be superior to interest in license of trustee in bankruptcy. *In re Coed Shop, Inc.*, 435 F. Supp. 472 (N.D. Fla. 1977), aff'd, 567 F.2d 1367 (5th Cir. Fla. 1978).

California's unique exception in UCC § 9-302(1)(g) which makes it unnecessary to file a financing statement to perfect a security interest in "general intangibles" includes assignment of rights in certain collect freight revenues payable to debtor, and this exception is not void based on policy expressed in section of Bankruptcy Act pertaining to preferential transfers of property. *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

When a loan is refinanced the original financing statement may stand if the col-

lateral is the same, as the original statement does not identify the debt in any way, and this conclusion is not affected by the existence of another local statute which provides for the release of any recorded lien or evidence of obligation when payment is made thereof. Under the Code, there is neither a necessity of filing a new financing statement because of the creation of a new refinancing loan nor any obligation to terminate the original financing statement. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

Code § 9-302(3)(b) could not exempt auto dealer from Code filing requirements, since state statute requiring cen-

tral filing of security interest applied only to those not automobile dealers or manufacturers. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

35. Multiple state transactions.

Where creditor obtained notes secured by chattel mortgages for money advanced to grow, harvest, and sell tobacco crops in two counties, but failed chattel mortgages only in one county clerk's office, creditor failed to perfect its security interest in tobacco crop in county in which there was no filing. *United Tobacco Whse. Co. v. Wells*, 490 S.W.2d 152 (Ky. 1973).

RESEARCH REFERENCES

ALR. Registration of mortgages or other liens on personal property in case of residents of other states. 10 A.L.R.2d 764.

Determination of purchase price of farm equipment for purposes of UCC § 9-302(1)(c) excusing filing of financing statement. 85 A.L.R.3d 1037.

When is filing financing statement necessary to perfect an assignment of accounts under UCC § 9-302(1)(c). 85 A.L.R.3d 1050.

Am Jur. 35 Am. Jur. 2d, Fixtures §§ 50, 51.

68A Am. Jur. 2d, Secured Transactions §§ 304-436.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:152 (proper filing as perfecting security interest between parties).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:511, 9:512, 9:521-9:525 (perfection of security interests; filing; when required, exceptions).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:617, 9:619 (filing; place; erroneous filing).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:631 (filing; formal requisites of financing statement).

CJS. 6A C.J.S., Assignments § 52.

79 C.J.S., Secured Transactions §§ 50 et seq.

72 C.J.S., Pledges § 14.

Law Reviews. Dunn, Construction Contract Claims and Litigation — Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 75-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.

(a) Except as otherwise provided in subsection (b) and Section 75-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under Section 75-9-308(d), (e), (f), or (g);

(2) That is perfected under Section 75-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in Section 75-9-311(a);

(4) In goods in possession of a bailee which is perfected under Section 75-9-312(d)(1) or (2);

(5) In certificated securities, documents, goods or instruments which is perfected without filing or possession under Section 75-9-312(e), (f), or (g);

(6) In collateral in the secured party's possession under Section 75-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under Section 75-9-313;

(8) In deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under Section 75-9-314;

(9) In proceeds which is perfected under Section 75-9-315; or

(10) That is perfected under Section 75-9-316.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

SOURCES: Former 1972 Code § 75-9-310 [Codes, 1942, § 41A:9-310; Laws, 1966, ch. 316, § 9-310, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-333 by Laws, 2001, ch. 495, § 1. Present § 75-9-310 was derived from former 1972 Code § 75-9-302 [Codes, 1942, § 41A:9-302; Laws, 1966, ch. 316, § 9-302; Laws, 1977, ch. 452, § 15; Laws, 1986, ch. 401, § 1; Laws, 1990, ch. 384, § 50; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Perfection without filing, see § 75-9-313.

Perfection by control, see § 75-9-314.

Priorities among conflicting security interests in and agricultural liens on same collateral, see § 75-9-322.

Contents of financing statement, see § 75-9-502.

Persons entitled to file a record, see § 75-9-509.

What constitutes filing, see § 75-9-516.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-302(1).

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| 6. In general; collateral in secured party's possession. | 14. Assignment of accounts. |
| 7. Beneficial interest in trust or estate. | 15. —“Significant part” distinguished. |
| 8. —Prior to 1977 amendment. | 16. —Contract rights (prior to 1977 amendment). |
| 9. Purchase money security interest; consumer goods. | 17. —General intangibles. |
| 10. —Motor vehicles. | 18. Collecting bank. |
| 11. —Fixtures. | 19. Assignment for benefit of creditors, or the like. |
| 12. —Equipment. | 20. Assignment of perfected interest. |
| 13. —Farm equipment (prior to 1977 amendment). | 21. United States laws and treaties. |
| | 22. State certificate of title laws. |
| | 23. —Collateral entrusted to merchant. |
| | 24. —Foreign state certificate of title laws. |
| | 25. Other state laws. |
| | 26. Multiple state transactions. |

I. Under Current Law.**1.-5. [Reserved for future use.]****II. Under former § 75-9-302(1).****6. In general; collateral in secured party's possession.**

In replevin action brought by finance company against garage owner, trial court erred in giving priority to finance company's chattel mortgage where it was not shown that such chattel mortgage had been perfected by filing and where, on other hand, garage owner had perfected his interest in automobile since he had possession of it. *Henson v. Government Emp. Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974).

The filing of a financing statement is unnecessary to perfect a security interest in United States coins having a numismatic value in excess of their face value, pledged with and delivered to a bank as collateral for a loan; for such coins are to be considered as "goods" rather than as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), *aff'd*, 387 F.2d 118 (8th Cir. Mo. 1968).

7. Beneficial interest in trust or estate.

Absent a filing in accordance with § 91-9-3, a trustor's assignments to the trustee of interest in real or personal property owned by the trust, were insufficient to attach a lien to the real property assets of the trust. Section 75-9-302(1)(c), which provides an exception to the filing requirement for a security interest created by an assignment of a beneficial interest in a trust, does not apply to liens on real property. *Merchants Nat'l Bank v. Bank of Miss.*, 584 So. 2d 433 (Miss. 1991).

Although beneficial interest in land trust is personal property under Illinois law, where (1) decedent assigned beneficial interest in land trust to bank as collateral for loan, and (2) bank was trustee of such trust and had both equitable and legal title to trust res, bank had interest in real estate that was exempt from provisions of UCC Art 9, including UCC § 9-302 dealing with perfection of security interests by filing, and bank therefore was not liable for conversion of decedent's beneficial interest in such trust

by proceeding in accordance with probate court's order concerning sale of trust res to satisfy claims of estate creditors, including that of bank. *In re Estate of McGaughey*, 60 Ill. App. 3d 150, 376 N.E.2d 259 (1st Dist. 1978).

8. —Prior to 1977 amendment.

Mortgagee failed to perfect its interest in land trust so as to entitle it to priority over mortgagors' judgment creditors, who established their claim to beneficial interest in trust by availing themselves of remedy of citation proceedings, where mortgagee delayed for over two years in filing financing statement with secretary of state as required under UCC § 9-302. *Mid-West Nat'l Bank v. Metcoff*, 23 Ill. App. 3d 607, 319 N.E.2d 336 (2d Dist. 1974).

9. Purchase money security interest; consumer goods.

Under Mississippi law, filing of financing statement is not required in order to perfect purchase money security interest in consumer goods. *In re Shaw*, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

Under Mississippi law, absent filed financing statements, furniture company's claims against three Chapter 13 debtors for balance due on household goods and furnishings were only secured to extent they represented purchase money security interests. *In re Shaw*, 209 B.R. 393 (Bankr. N.D. Miss. 1996).

Watches and rings were "consumer goods" within the meaning of subsection (1)(d) of this section; assignment of security interest did not modify character of transaction as purchase-money transaction. *In re Boykins*, 120 B.R. 71 (Bankr. N.D. Miss. 1990).

UCC § 9-302(1)(d), which as an exception to the filing requirements of UCC § 9-302(1) provides that a purchase-money security interest in consumer goods is perfected without filing, is not unconstitutional (1) on the ground that it violates equal protection by not providing for a rational classification or (2) on the ground that it violates due process by not providing notice by filing. A purchase-money security interest in consumer goods is a rational classification, and the existence of the exception is sufficient to

put subsequent creditors on notice. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978).

Where debtor purchased stereo on credit and granted creditor security interest, where security agreement granted creditor security interest in "each item of merchandise purchased or hereafter purchased," but also provided that, in case of items purchased on different dates, item first purchased would be deemed paid for first, and where debtor subsequently purchased freezer under same arrangement, signing another agreement with same language, creditor had perfected the security interest in both stereo and freezer under UCC § 9-302, although creditor did not file financing statements; creditor's security interest in stereo by explicit terms of agreement was to terminate as soon as purchase price of stereo was paid and, since collateral secured only debt representing its price, security agreement created purchase money security interest in consumer goods which did not need to be filed in order to be perfected. In *re Staley*, 426 F. Supp. 437 (M.D. Ga. 1977).

Where debtors purchased from creditor, on credit, household appliances and goods, granting security interest to creditor, where security agreement clearly provided that, so long as any indebtedness was outstanding, property stood as collateral not only for its price but also for price of property subsequently acquired on credit, and where debtors subsequently purchased vacuum cleaner and added it to their account with creditor, signing another financing statement, creditor did not have purchase money interest in property purchased on first sale and, therefore, exception from filing requirement provided for purchase money security interest in consumer goods under UCC § 9-302 did not apply; having failed to file financing statement, creditor did not have perfected security interest and, therefore, did not have secured claim against property in bankruptcy proceeding. In *re Norrell*, 426 F. Supp. 435 (M.D. Ga. 1977).

Furniture dealer with security interest in household furniture and TV set purchased by bankrupt debtor could not claim perfected security interest in such goods

under exception from filing requirements for consumer goods contained in UCC § 9-302(d) where security agreement covered items purchased at different times with no information as to which items were paid for and which were not; furniture dealer's interest was not "purchase money security interest" since it was not taken or retained by dealer solely to secure all or part of collateral's price. In *re Manuel*, 507 F.2d 990 (5th Cir. Ga. 1975).

Where defendant pawnshop purchased television sets from debtor who was not in business of selling television sets, and later resold them, defendant pawnshop was liable to secured party with purchase money security interest, despite fact that security interest was never recorded. *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658 (Tex. Civ. App. 1972).

A guitar and amplifier primarily used by the purchaser to perform in night clubs are "equipment" and not "consumer goods," and consequently the seller's security interest must be perfected to be enforceable against a person to whom the instruments were subsequently pawned. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

A conditional sales contract is a valid security interest, analogous to a chattel mortgage, and when it is executed prior to the making of a federal tax assessment against the conditional vendee it is prior thereto and its filing is unnecessary as against the United States. *United States v. Lebanon Woolen Mills Corp.*, 241 F. Supp. 393 (D.N.H. 1964).

"Conditional sales contract note" covering furniture, furnishings and carpeting sold to a non-profit corporation was not excluded from filing requirements. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

Since a household laundry dryer is within the definition of "consumer goods," a purchase money security interest therein may be perfected without the filing of a financing statement. *United Gas Imp. Co. v. McFalls*, 18 Pa. D. & C.2d 713 (1959).

10. —Motor vehicles.

A lender's attached purchase money security interest in an automobile dealer-

ship's inventory of used vehicles was not properly perfected under the Mississippi Motor Vehicle Title Law where the lender never filed a financing statement. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937 (Miss. 1990).

Where (1) first creditor filed financing statement covering present and future inventory of motor-home retailer, (2) retailer thereafter acquired motor home from manufacturer and placed it in retailer's inventory for resale, (3) second creditor made loan to retailer and filed financing statement on such motor home without determining whether any prior financing statements were on file, (4) second creditor thereafter filed application for title certificate for home, which was issued five months later and indicated that retailer was home's owner and that second creditor was first lienholder, and (5) on retailer's default on loan, second creditor filed declaratory-decree action seeking to have its lien determined to be superior to that of first creditor, court held (1) that when first creditor filed financing statement on retailer's inventory, no title certificate or manufacturer's certificate of origin was in existence and thus first creditor could only protect its lien right by filing financing statement under Florida Uniform Commercial Code, (2) that both Florida Uniform Commercial Code, in § 9-302(3)(b), and Florida Motor Vehicle Title Certificates Act provide that lien recording provisions of Uniform Commercial Code, rather than those of Motor Vehicle Title Certificates Act, govern liens on motor vehicles held as inventory, (3) that at time of second creditor's loan to retailer, second creditor knew that no title certificate had been issued, (4) that first creditor was entitled to rely on its financing statement as notice to second creditor of first creditor's prior lien, (5) that second creditor was not buyer in ordinary course of business under UCC § 9-307(1), and (6) that since second creditor was not buyer in ordinary course of business, first creditor's security interest in motor home was superior to that of second creditor. *Borg-Warner Acceptance Corp. v. Atlantic Bank*, 364 So. 2d 35 (Fla. App. 1978).

Under UCC § 9-302(1)(d), a valid financing statement, properly filed, per-

fects a security interest in a motor vehicle. Until that time, under UCC § 9-301(1)(c), a buyer not in the ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the unperfected security interest, takes free of such interest. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

A mobile home is a motor vehicle within the meaning of this section which requires that a financing statement must be filed to perfect a security interest therein. *Recchio v. Manufacturers & Traders Trust Co.*, 35 A.D.2d 769 (4th Dep't 1970).

The holder of a security interest in an automobile purchased for personal, family, or household purposes need not file any statement of his security interest in order to preserve that interest against the claims of third persons. *National Shawmut Bank v. Corcoran Motor Sales Co.*, 47 Mass. App. Dec. 72 (1971).

Under Massachusetts version of Code § 9-302(1)(d) omitting filing requirement for licensed motor vehicles, neither filing nor any step, other than execution and delivery of conditional sales contract, was necessary to make security interest attach in automobile purchased as "consumer goods". *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

Under (1)(d) of the instant section which deliberately omitted a provision of the official code draft excluding automobiles from the exception of consumer goods, filing is not required in Massachusetts to perfect a purchase money security interest in consumer goods, including automobiles, under § 9-303 the interest became perfected when it attached, and where an automobile was purchased under a conditional sale contract, nothing other than the execution and delivery of the contract was necessary to make the security interest attach. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

A house trailer is a motor vehicle within the meaning of the Uniform Commercial Code provision requiring filing with respect to motor vehicles which are to be licensed or registered in this state, and therefore mortgagee who perfected his security interest by filing the same was

entitled to possession of a trailer as opposed to the owner of a retail instalment contract whose filing had expired prior to the mortgagee's perfecting of his security interest. *Albany Disct. Corp. v. Mohawk Nat'l Bank*, 54 Misc. 2d 238 (1967), modified on other grounds, 30 A.D.2d 623, 290 N.Y.S.2d 576 (3d Dep't 1968), on reargument, 30 A.D.2d 919, 292 N.Y.S.2d 300 (3d Dep't 1968), aff'd, 28 N.Y.2d 222, 321 N.Y.S.2d 94, 269 N.E.2d 809 (1971).

The holder of a purchase money security interest in an automobile which qualified as "consumer goods" is not required to file a financing statement in order to assert successfully such interest against third persons. *Rockland Credit Union, Inc. v. Gauthier Motors, Inc.*, 39 Mass. App. Dec. 180 (1967).

Where the conditional buyer of an automobile warranted and covenanted on the face of the security instrument that it was bought and used primarily for personal, family or household purposes, the trial court correctly ruled that the vehicle was consumer goods to which the filing provisions of Article 9 did not apply. *Natick Trust Co. v. Bay State Truck Lease, Inc.*, 28 Mass. App. Dec. 60 (1963).

Automobiles delivered by an automobile manufacturer to its authorized dealer, with a reservation of title until actual payment therefor, were not "consumer goods" which would relieve the manufacturer, as the holder of a security interest, from the requirement of perfecting its security interest in order to take priority over a lien creditor. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

11. —Fixtures.

A security interest in equipment fixtures is perfected by filing a financing statement. *In re Lux's Superette, Inc.*, 206 F. Supp. 368 (E.D. Pa. 1962).

12. —Equipment.

Although it had been orally agreed between buyer and seller that delivery of machine was not to be made except upon payment, such agreement as to delivery and payment was modified or waived by seller, and buyer became credit buyer, when manufacturer mistakenly shipped machine to buyer and seller forwarded

invoice requiring payment "net in 30 days"; consequently, buyer acquired rights in machine and seller's unperfected purchase money security interest became subordinate to lender's security interest in buyer's after-acquired "equipment." *Galleon Indus., Inc. v. Lewyn Mach. Co.*, 50 Ala. App. 334, 279 So. 2d 137 (Civ. App. 1973), cert. denied, 291 Ala. 779, 279 So. 2d 142 (1973).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

The filing of a financing statement or a copy of the contract of sale was necessary under this section to perfect the seller's security interest in the instalment sales of equipment for a butcher business and a retail grocery store. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

Guitar and amplifier primarily used to perform in night clubs were "equipment" within Code § 9-109(2), and not within Code § 9-302(1)(d) consumer goods exception to Code filing requirements. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

13. —Farm equipment (prior to 1977 amendment).

Pursuant to FS § 679.302(1)(c), no filing is required with respect to the sale of several separate items of farm equipment, each costing less than \$2500, even though when totaled under one contract, the price of the items exceeded \$2500. *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32, 85 A.L.R.3d 1015 (1974), but see *In re Outrigger Club, Inc.*, 6 B.R. 78 (Bankr. S.D. Fla. 1980); *Regan v. ITT Industrial Credit Co.*, 469 So. 2d 1387 (Fla. Ct. App. 1984); *ITT*

Industrial Credit Co. v. Regan, 487 So. 2d 1047 (Fla. 1986).

Haybine, designed and marketed for purpose of mowing and conditioning hay, was bought by retail business owner for commercial haycutting and baling; held, machine was, at all material times, "farm equipment" within Code exemption of filing requirement. *Citizens Nat'l Bank v. Sperry Rand Corp.*, 456 S.W.2d 273 (Tex. Civ. App. 1970), writ ref'd n.r.e., (Oct. 7, 1970).

Farm equipment is classified as consumer goods. *Lonoke Prod. Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964).

14. Assignment of accounts.

Defendant finance company did not acquire security interest in two vehicles superior to that of plaintiff bank, by virtue of automobile dealer's execution and filing of inventory security agreements in favor of the defendant covering vehicles, where vehicles had originally been sold by dealer and conditional sales contracts were assigned to plaintiff subject to recourse contract with dealer, where plaintiff had at all times had possession of certificates of ownership for vehicles and was listed as legal owner thereon, where dealer had possession of vehicles as result of their repossession by plaintiff pursuant to recourse agreement following purchasers' defaults, and where plaintiff had demanded, unsuccessfully, that dealer pay balance due on conditional sales contracts as provided by recourse agreement; under UCC § 9-204, dealer, as debtor, did not acquire rights in subject motor vehicles sufficient to transfer valid security interest to defendant; nor could defendant, by advancing flooring money to dealer be considered buyer in ordinary course of business, but was rather financing agency only, excluded from protection created by UCC § 9-307. *Mother Lode Bank v. GMAC*, 46 Cal. App. 3d 807 (3d Dist. 1975).

Assignee (from 1st assignee) of assigned claim steps into shoes of his assignor as to priorities, even if latter assignee makes no new filing. *Grise v. White*, 355 Mass. 698, 247 N.E.2d 385 (1969).

Factoring company, to whom an attorney assigned fees to be received from a

certain client, which failed to perfect its security interest by filing a financing statement was subordinated to the rights of another lawyer who, with no knowledge of the prior assignment, became entitled to receive the fees by reason of an agreement with the assigning attorney. *In re Cohen's Estate*, 38 Pa. D. & C.2d 777 (1966).

A letter written by a subcontractor to his general contractor advising the latter of the assignment of his account for work performed to a bank, the written acceptance of the letter by the addressee, and the fact that the bank loaned money to the subcontractor taking the letter assignment as collateral created a valid security interest which did not have to be perfected by the filing of a financing statement. *Citizens & S. Nat'l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965).

Under subsection (2) of the instant section, a security interest can be "assigned" to another creditor without loss of its priority even if no filing is made. Thus, where the order of priority under § 9-312(5)(a) among three creditors is A, B, and C, and A assigns his security interest to C, it would follow that C would acquire A's priority over B. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by an automobile dealer who for automobiles used as demonstrators executed installment sales contracts as both seller and buyer, and the bank subsequently accepted an assignment of such installment contracts, which in effect substituted them for the original financing arrangement, the filing of a financing statement with respect to the wholesale credit plan was ineffective to make the bank's security interest under the installment contracts a perfected interest as against the receiver in equity of the dealer. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

15. —"Significant part" distinguished.

Assignee of contract rights in motion picture film was required to file financing statement under UCC § 9-302(1)(e) ab-

sent evidence that such assignment was insignificant part of outstanding accounts or rights of assignor; party claiming exemption from filing requirement under UCC §§ 9-302(1)(e) had burden of proving that assignment came within scope of statutory exemption and fact that assignment may have been isolated or casual transaction was not proper test. *Consolidated Film Indus. v. United States*, 547 F.2d 533 (10th Cir. Utah 1977).

Letter allegedly establishing assignment of foreign exchange contract rights to bank did not measure up to security agreement under UCC since it failed to contain "description of the collateral" as required by § 9-203(1)(a). Moreover, bank failed to file financing statement, as required by §§ 9-302(1) and 9-303 and, thus, failed to obtain valid and perfected assignment of contract rights. Purported assignment was not exempt from filing under UCC § 9-302(1)(e) since, at time assignee allegedly assigned contract worth \$1,000,000, assignee's total "outstanding accounts or contract rights" were \$4,439,000; thus, assignment transferred just under 20 percent of assignee's accounts, including assigned contract right, which constituted "significant part" of assignee's outstanding accounts, especially in view of high absolute value of transaction at issue. *Miller v. Wells Fargo Bank Int'l Corp.*, 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. N.Y. 1976).

Where assignment transferred significant part of outstanding contract rights to bank, bank was required to file financing statement in order to perfect its security interest under UCC § 9-302, and, where bank failed to perfect security interest until after filing and recording of materialmen's liens, bank was not entitled to priority over liens under UCC § 9-310. *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974).

Total of accounts receivable amounted to 16% of debtor's outstanding accounts receivable; amount of account assigned was slightly over \$3,000 out of total accounts receivable of \$19,000; held, assignment of accounts receivable was not significant part of debtor's outstanding accounts receivable and therefore no fi-

nancing statement was required to be filed to perfect security interest therein. *Standard Lumber Co. v. Chamber Frames, Inc.*, 317 F. Supp. 837 (E.D. Ark. 1970).

Casual or isolated transfer of accounts receivable, taken by one who was not regular assignee thereof but by one who was acting at assistance of accountant, was within exception to requirement of filing of financing statement, since transfer was not as to "a significant part of the outstanding accounts". *Abramson v. Printer's Bindery, Inc.*, 440 S.W.2d 326 (Tex. Civ. App. 1969).

16. —Contract rights (prior to 1977 amendment).

To obtain priority over federal tax lien, assignment of royalty rights in showing of movie should have been perfected by filing of financing statement, unless it could be shown that at time of assignment substantial contract rights were outstanding within the meaning of (former) subd. (1)(e). *Consolidated Film Indus. v. United States*, 547 F.2d 533 (10th Cir. Utah 1977).

Assignments of contract rights were casual and isolated, and thus were exempt from filing requirement under UCC § 9-302(1)(e) and were perfected at time of assignment, where assignee was wholesaler of wood products and was not in business of commercial financing or obtaining assignment and where, although assignee had in past few years occasionally taken an assignment as payment for materials supplied, it did not regularly take assignments of any debtors' accounts or contract rights. *Architectural Woods, Inc. v. State*, 88 Wash. 2d 406, 562 P.2d 248 (1977).

Where creditor's assignment of debtor's right to receive payments of proceeds of construction contracts involved over one third of unearned portion of proceeds, and where creditor was engaged in regular business of interim financing, creditor's assignment of contract rights did not qualify for filing exemption of UCC § 9-302(1)(e); thus, where one creditor took assignment of debtor's right to receive payment of proceeds of construction contracts but did not file financing statement, and where subsequent creditor obtained

security interest covering same collateral and filed financing statements pursuant to UCC § 9-302, junior but perfected security interest had priority over senior but unperfected security interest. *H. & Val J. Rothschild, Inc. v. Northwestern Nat'l Bank*, 309 Minn. 35, 242 N.W.2d 844, 85 A.L.R.3d 1043 (1976).

Under UCC § 9-302(1)(e) there was exemption from filing requirement for contract right and account where amount at issue did not constitute a significant part of subcontractor's receivable, where assignment was isolated event under SBA arrangement. *E. Turgeon Constr. Co. v. Elhatton Plumbing & Heating Co.*, 110 R.I. 303, 292 A.2d 230 (1972).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid against a lien creditor, including a trustee in bankruptcy, from the date of the filing of the petition: hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

17. —General intangibles.

Assignment of portion of expected recovery of pending lawsuit given as security for loan and accounting services was not assignment of "account" or "contract right," but was more aptly categorized as assignment of "general intangible," which would not be perfected until filing of financing statement. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

California has a unique exception in UCC § 9-302(1)(g) which makes it unnecessary to file a financing statement to perfect a security interest in "general intangibles"; assignee first giving notice to third party debtor in writing thereby perfects such interest; this California exception is not void because in conflict with

Section 60 of the Bankruptcy Act. *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

Lien obtained through attachment execution on partnership interest, after defendant had allegedly assigned interest to his attorney as collateral for fees and costs, took priority over rights of attorney-assignee; partnership interest came within definition of "general intangible" under UCC § 9-106, security interest therein was clearly within scope of security interests governed by article 9 of code under UCC § 9-102, and, inasmuch as no financing statement was filed under UCC § 9-302, such security interest was unperfected and plaintiff's lien, obtained through attachment execution, took priority under UCC § 9-301 over rights of defendant's attorney as holder of unperfected security interest of which plaintiff had no knowledge. *Med-Mar, Inc. v. Dilworth*, 96 Montg. County L. Rep. 91 (Pa. 1972).

18. Collecting bank.

Bank claiming security interest in sum on deposit with bank in joint account of homeowners and Farmers Home Administration had not brought itself with exception to need for filing financing statement within UCC § 9-302(1) where bank had no setoff against either of these parties, where there was no assignment transferring the deposit, where the bank did not have "possession" of the deposit within UCC § 9-305, and where the bank had no lien priority against the deposit. *Craig v. Gudim*, 488 P.2d 316 (Wyo. 1971).

19. Assignment for benefit of creditors, or the like.

Where security interest was perfected by filing a financing statement, but no continuation statement was filed, effectiveness of original statement lapsed five years after initial filing and, as result, security interest became unperfected under UCC § 9-403(2), (3); however, lapse of effectiveness of financing statement, while vitiating perfection, had no effect on viability of security agreement itself; thus, where secured party took possession of collateral one day before debtor executed assignment for benefit of creditors, taking of possession by secured party constituted

perfection of security interest under UCC §§ 9-302(1)(a), 9-305 and 9-503 which rendered it superior to right therein of assignee. *Rosner v. Plaza Hotel Assocs.*, 146 N.J. Super. 447, 370 A.2d 41 (App. Div. 1977).

20. Assignment of perfected interest.

Where contractor assigned accounts receivable from defendant gas company to bank as permitted by UCC §§ 9-102(1)(a) and 9-204(3), and security interest was perfected under UCC §§ 9-302 and 9-401(1)(c), defendant was liable to bank for loss suffered by failure of defendant to honor security agreement by making checks payable to contractor rather than bank. *Bank of Commerce v. Intermountain Gas Co.*, 96 Idaho 29, 523 P.2d 1375 (1974).

21. United States laws and treaties.

Federal Aviation Act (49 USCS §§ 1401 et seq.) preempts UCC § 9-307(1), dealing with rights of buyers in ordinary course of business, and renders properly registered security interest in airplane enforceable against buyer in ordinary course of business who subsequently purchases such plane. *O'Neill v. Barnett Bank*, 360 So. 2d 150 (Fla. App. 1978).

Provision in security agreement executed on purchase of new automobile which provided that until indebtedness was fully paid, "seller has and shall retain title to and a security interest in the property" did not violate federal Truth-in-Lending Act and Regulation Z, since (1) Uniform Commercial Code, in UCC § 1-201(37), now provides universal definition of term "security interest," (2) Uniform Commercial Code was designed to replace confusingly numerous security devices that prevailed under pre-Code practice, and (3) it would therefore be anomalous and counterproductive of UCC objectives to interpret Regulation Z, which requires disclosure of "type of any security interest held," as requiring lender to specify particular security device employed. In such case, it was sufficient that security agreement in issue contained reference to a "security interest" in property described in the agreement that was enforceable under the Uniform Commercial Code, and statement in the agreement that seller re-

tained "title" to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender's disclosure statement confusing or misleading. *Drew v. Flagship First Nat'l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977).

Recording provisions of Federal Aviation Act preempt recording provisions of state law (UCC § 9-302) relating to recording of security interest in aircraft, but other provisions of state law relating to validity and priority of security interest, and remedies available to holders thereof, are not preempted. *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976).

Creditor's security interest in accounts of joint venture attached under UCC § 9-204 but was not perfected under UCC § 9-302(1) and was subordinated to federal tax lien where only financing statement filed covered earlier loan to one joint venturer and did not give notice to potential creditors of joint venture that security interest was in existence against joint venture. *United States v. Merchants & Marine Bank*, 292 So. 2d 151 (Miss. 1974).

22. State certificate of title laws.

Where the certificate of title of an automobile contained a notation of the creditor's encumbrance, the notation complied with paragraph (b) of subdivision (3) of this section, although the creditor never had possession of the car. *Harry Cramer, Inc. v. Morris*, 37 Pa. D. & C.2d 747 (1965).

The Uniform Commercial Code does not apply to perfecting liens or encumbrances or security interest in motor vehicles in view of the fact that the legislature, under the Vehicle Code, had set up an elaborate and comprehensive system for the issuance of certificates of title for motor vehicles, for the central filing of such certificates of title and for the procedure to be followed in perfecting security interest therein. *Union Nat'l Bank & Trust Co. v. Geyer Auction, Inc.*, 18 Pa. D. & C.2d 98 (1958).

The filing of a financing statement was not required under this section to perfect a security interest in a truck, where the encumbrance was noted on the title certificate to the truck, in accordance with a statute providing for a statement on the

certificate of title of liens or encumbrances on the vehicle and making such notations adequate notice to creditors. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

23. —Collateral entrusted to merchant.

In action by lender to establish security interest in mobile homes "floor-planned" for dealer, (1) where lender pursuant to written agreement advanced money to dealer in Arizona for inventory financing, agreement gave lender security interest in all of dealer's present and after-acquired inventory, and lender filed financing statement with Arizona secretary of state; (2) where Alabama manufacturer thereafter orally sold 16 mobile homes to dealer but was not paid therefor, invoice accompanying such homes stated that title thereto could be transferred only through manufacturer's certificate of origin, and manufacturer retained all such certificates; (3) where manufacturer did not file financing statement evidencing its interest in such homes with Arizona secretary of state; and (4) where Arizona motor-vehicle registration code, at time of sale of homes to dealer, exempted them from registration requirement while they were still owned by dealer or manufacturer, plaintiff lender (1) was not required to file financing statement and certificates of title to homes with Arizona motor-vehicle division in order that lender's lien could be indorsed on such certificates and lender's security interest in dealer's inventory could be perfected; (2) lender's security interest in homes was perfected merely by filing financing statement with Arizona secretary of state pursuant to UCC § 9-302(1) and UCC § 9-401; (3) manufacturer, by retaining title to homes, merely reserved unperfected purchase-money security interest therein under UCC § 2-401; and (4) lender's perfected security interest in homes had priority over manufacturer's unperfected security interest therein under UCC § 9-301. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

Where automobile manufacturer, who had delivered automobiles to its authorized dealer with reservation of title until paid for, failed to file a financing statement, its unperfected security interest

was subordinate to the interest of a receiver for the dealer who had the status of a lien creditor without notice of such unperfected security interest. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

24. —Foreign state certificate of title laws.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his assignor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978).

Bank which loaned money to debtor to buy mobile home, and which failed to get its lien noted on bill of sale for such home with result that lien was not noted on any certificate of title to home until second certificate of title was issued one day before debtor filed petition in bankruptcy, did not do all that it could have done, under Kansas version of 1972 amendment

to Official UCC § 9-302(3), to perfect its security interest in home, and thus trustee in bankruptcy, and not bank, was entitled to home. *Lentz v. St. Mary's State Bank*, 443 F. Supp. 219 (D. Kan. 1977).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973).

By virtue of the provisions of subsec. (3), the filing provisions of Article 9 have no application to motor vehicles in the State of Georgia required to be registered under the Motor Vehicles Certificate Title Act. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

A bank which had filed its financing statement with the New Jersey Secretary of State had perfected its security interest in five items of self-propelled earth moving equipment, although it had not filed a financing statement with the Director of Division of Motor Vehicles, an act required by state statute as a condition precedent to the perfection of a security interest in "motor vehicles" (a term defined in the statute to include self-propelled earth moving equipment), the court holding that despite the statutory definition, the term "motor vehicle" was not intended to embrace machines which normally operate at construction sites even though literally they perhaps can be used to transport persons on a highway. *In re Ferro Contracting Co.*, 380 F.2d 116 (3d Cir. N.J. 1967), cert. denied, 389 U.S. 974, 88 S. Ct. 475, 19 L. Ed. 2d 466 (1967).

25. Other state laws.

Statute which merely provided means to enable holder of lien on liquor license to receive notice from State Division of Beverage in event action was taken that might affect license's continued existence, and which did not necessarily give such notice to entire world, was not substitute central filing system within meaning of Florida UCC § 9-302(3)(b), so as to enable bank's security interest in debtor's liquor license to be deemed to have been perfected at date debtor's petition for bankruptcy was filed and thus to be superior to interest in license of trustee in bankruptcy. *In re Coed Shop, Inc.*, 435 F. Supp. 472 (N.D. Fla. 1977), aff'd, 567 F.2d 1367 (5th Cir. Fla. 1978).

California's unique exception in UCC § 9-302(1)(g) which makes it unnecessary to file a financing statement to perfect a security interest in "general intangibles" includes assignment of rights in certain collect freight revenues payable to debtor, and this exception is not void based on policy expressed in section of Bankruptcy Act pertaining to preferential transfers of property. *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

When a loan is refinanced the original financing statement may stand if the collateral is the same, as the original statement does not identify the debt in any way, and this conclusion is not affected by the existence of another local statute which provides for the release of any recorded lien or evidence of obligation when payment is made thereof. Under the Code, there is neither a necessity of filing a new financing statement because of the creation of a new refinancing loan nor any obligation to terminate the original financing statement. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

Code § 9-302(3)(b) could not exempt auto dealer from Code filing requirements, since state statute requiring central filing of security interest applied only to those not automobile dealers or manufacturers. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

26. Multiple state transactions.

Where creditor obtained notes secured by chattel mortgages for money advanced

to grow, harvest, and sell tobacco crops in two counties, but failed chattel mortgages only in one county clerk's office, creditor failed to perfect its security interest in

tobacco crop in county in which there was no filing. *United Tobacco Whse. Co. v. Wells*, 490 S.W.2d 152 (Ky. 1973).

§ 75-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Section 75-9-310(a);

(2) Sections 63-21-1 through 63-21-77 (the Mississippi Motor Vehicle and Manufactured Housing Title Law) or a certificate of title issued pursuant to Sections 59-25-1 through 59-25-17 (Certificates of Title for Boats and Other Vessels); or

(3) A certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) and Sections 75-9-313 and 75-9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) and Section 75-9-316(d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) During any period in which collateral subject to a statute specified in subsection (a)(2) is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person.

SOURCES: Former 1972 Code § 75-9-311 [Codes, 1942, § 41A:9-311; Laws, 1966, ch. 316, § 9-311, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-401 by Laws, 2001, ch. 495, § 1. Present § 75-9-311 was derived from former 1972 Code § 75-9-302 [Codes, 1942, § 41A:9-302; Laws, 1966, ch. 316, § 9-302; Laws, 1977, ch. 452, § 15; Laws, 1986, ch. 401, § 1; Laws, 1990, ch. 384, § 50; Laws, 1996, ch. 468, § 62, eff from and after July

1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-302(3), (4).

6. United States laws and treaties.
7. State certificate of title laws.
8. —Collateral entrusted to merchant.
9. —Foreign state certificate of title laws.
10. Other state laws.
11. Multiple state transactions.

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the Uniform Commercial Code, and statement in the agreement that seller retained "title" to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender's disclosure statement confusing or misleading. *Drew v. Flagship First Nat'l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977).

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Geyer Auction, Inc., 18 Pa. D. & C.2d 98 (1958).

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9. --Foreign state certificate of title laws.

Bank which loaned money to debtor to buy mobile home, and which failed to get its lien noted on bill of sale for such home with result that lien was not noted on any certificate of title to home until second certificate of title was issued one day before debtor filed petition in bankruptcy, did not do all that it could have done, under Kansas version of 1972 amendment to Official UCC § 9-302(3), to perfect its security interest in home, and thus trustee in bankruptcy, and not bank, was entitled to home. Lentz v. St. Mary's State Bank, 443 F. Supp. 219 (D. Kan. 1977).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. In re Dobbins, 371 F. Supp. 141 (D. Kan. 1973).

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signor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978).

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By virtue of the provisions of subsec. (3), the filing provisions of Article 9 have no application to motor vehicles in the State of Georgia required to be registered under the Motor Vehicles Certificate Title Act. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

10. Other state laws.

Statute which merely provided means to enable holder of lien on liquor license to receive notice from State Division of Beverage in event action was taken that might affect license's continued existence, and which did not necessarily give such notice to entire world, was not substitute central filing system within meaning of Florida UCC § 9-302(3)(b), so as to enable bank's security interest in debtor's liquor license to be deemed to have been perfected at date debtor's petition for bankruptcy was filed and thus to be superior to interest in license of trustee in bankruptcy. *In re Coed Shop, Inc.*, 435 F. Supp. 472 (N.D. Fla. 1977), aff'd, 567 F.2d 1367 (5th Cir. Fla. 1978).

California's unique exception in UCC § 9-302(1)(g) which makes it unnecessary to file a financing statement to perfect a security interest in "general intangibles" includes assignment of rights in certain collect freight revenues payable to debtor, and this exception is not void based on policy expressed in section of Bankruptcy Act pertaining to preferential transfers of property. *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. Cal. 1972).

When a loan is refinanced the original financing statement may stand if the collateral is the same, as the original statement does not identify the debt in any way, and this conclusion is not affected by the existence of another local statute which provides for the release of any recorded lien or evidence of obligation when payment is made thereof. Under the Code, there is neither a necessity of filing a new financing statement because of the creation of a new refinancing loan nor any obligation to terminate the original financing statement. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

Code § 9-302(3)(b) could not exempt auto dealer from Code filing requirements, since state statute requiring cen-

tral filing of security interest applied only to those not automobile dealers or manufacturers. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

11. Multiple state transactions.

Where creditor obtained notes secured by chattel mortgages for money advanced

to grow, harvest, and sell tobacco crops in two counties, but failed chattel mortgages only in one county clerk's office, creditor failed to perfect its security interest in tobacco crop in county in which there was no filing. *United Tobacco Whse. Co. v. Wells*, 490 S.W.2d 152 (Ky. 1973).

§ 75-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.

(a) A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) Except as otherwise provided in Section 75-9-315(c) and (d) for proceeds:

(1) A security interest in a deposit account may be perfected only by control under Section 75-9-314;

(2) And except as otherwise provided in Section 75-9-308(d), a security interest in a letter-of-credit right may be perfected only by control under Section 75-9-314; and

(3) A security interest in money may be perfected only by the secured party's taking possession under Section 75-9-313.

(c) While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of twenty (20) days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for twenty (20) days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for twenty (20) days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) After the twenty-day period specified in subsection (e), (f), or (g) expires, perfection depends upon compliance with this article.

SOURCES: Former 1972 Code § 75-9-312 [Codes, 1942, § 41A:9-312; Laws, 1966, ch. 316, § 9-312; Laws, 1977, ch. 452, § 21; Laws, 1986, ch. 343, § 2; Laws, 1990, ch. 384, § 54; Laws, 1996, ch. 468, § 69, eff from and after July 1, 1996] is now found in comparable provisions enacted at §§ 75-9-322 through 75-9-324 by Laws, 2001, ch. 495, § 1. Present § 75-9-312 was derived from former 1972 Code §§ 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and 75-9-304 [Codes, 1942, § 41A:9-304; Laws, 1966, ch. 316, § 9-304; Laws, 1977, ch. 452, § 16; Laws, 1990, ch. 384, § 51; Laws, 1996, ch. 460, § 25; Laws, 1996, ch. 468, § 65, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Commercial paper, see §§ 75-3-101 et seq.

Documents of title, see §§ 75-7-101 et seq.

Investment securities, see §§ 75-8-101 et seq.

Perfection without filing, see § 75-9-313.

Perfection by control, see § 75-9-314.

Contents of financing statement, see § 75-9-502.

Persons entitled to file a record, see § 75-9-509.

What constitutes filing, see § 75-9-516.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-304.

A. Decisions Under Uniform Commercial Code.

6. In general.
7. Perfection by possession.
8. Perfection by filing.
9. Perfection by notification.
10. Effect of failure to perfect security interest.
11. Priorities.

B. Decisions Under Former Statutes.

12. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-304.

A. Decisions Under Uniform Commercial Code.

6. In general.

This section of the Code relates to secured transactions insofar as third persons are concerned and does not determine the effect of a secured transaction as between the original debtor and the original creditor. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

7. Perfection by possession.

Where (1) first bank, which had loaned debtor \$20,000 and accepted as collateral nonnegotiable certificate of deposit that first bank had previously issued to debtor, inadvertently delivered renewal certificate to debtor, (2) debtor, instead of returning renewal certificate to first bank, used it as collateral for loan from second bank and gave second bank security interest in renewal certificate that second bank perfected by possession under UCC § 9-304(1), and (3) on debtor's default on both loans, second bank presented renewal certificate to first bank, which dishonored it, court held (1) that second bank was not holder in due course under UCC §§ 3-302(1) and 3-805 because renewal certificate was nonnegotiable under UCC § 3-104(1)(d), (2) that as a result, second bank was mere assignee of renewal certificate and certificate under assignments statute was subject to first bank's right of setoff, (3) that exclusion of right of setoff from Article 9 protection means that claimant of right of setoff (first bank) against collateral (renewal certificate) is not barred from enforcing such right merely because another creditor (second bank) has perfected security interest in collateral by taking possession thereof, since right of setoff is separate from priority provisions of Article 9, and (4) that as a result, second bank held debtor's renewal certificate subject to any defenses of first bank, which "defenses" included first bank's right of setoff. *Bank of Crystal Springs v. First Nat'l Bank*, 427 So. 2d 968 (Miss. 1983).

Where two certificates of deposit were indorsed in blank by owners and delivered to bank to enable third party to obtain line of credit from bank; where in connection with delivery of certificates, owners thereof also simultaneously executed two instruments entitled "Consent to Pledge" and "Security Agreement-Pledge" which specifically described collateral (the two certificates of deposit) for proposed extension of credit by bank; and where bank in reliance on such instruments and delivery of the collateral advanced desired line of credit to third party, effect of transaction under UCC § 9-304(1) and § 9-305 was to create and perfect valid security interest in certificates in favor of bank which was

enforceable under UCC § 9-203(1). *Montavon v. Alamo Nat'l Bank*, 554 S.W.2d 787 (Tex. Civ. App. 1977).

Subcontractor's delivery of certificate of deposit to attorney, as alleged escrow agent, was not delivery to general contractor and thus general contractor did not perfect security interest in certificate prior to four months statutory period preceding subcontractor's bankruptcy where, inter alia, during time that certificate was in possession of attorney, interest was paid to subcontractor rather than general contractor, and where, although attorney was attorney to whom general contractor normally referred its legal matters, attorney also did some legal work for subcontractor. *Stein v. Rand Constr. Co.*, 400 F. Supp. 944 (S.D.N.Y. 1975).

Where corporation's stock was physically endorsed by guarantor and voluntarily delivered to corporation as security pursuant to terms of guarantee agreement, and where corporation's receiver subsequently took possession of stock certificates as officer of court and pursuant to statutory authority, such possession was necessary to maintain corporation's security interest in stock under UCC §§ 9-304 and 9-305, and could not be considered prejudgment seizure of property. *State ex rel. Hunt v. Liberty Investors Life Ins. Co.*, 543 P.2d 1390 (Okla. 1975).

Since non-negotiable certificate of deposit was "instrument" under UCC § 9-105(1)(g), only way security interest in certificate could be perfected was by possession under specific provisions of UCC § 9-304(1) and, thus, where secured party perfected security interest in certificate of deposit by taking possession, no subsequent claim by bank could impair that interest, and bank was not entitled to offset against certificate its claims against original owner of certificate arising out of original owner's previous indebtedness to bank. *First Nat'l Bank v. Lone Star Life Ins. Co.*, 524 S.W.2d 525 (Tex. Civ. App. 1975), writ ref'd n.r.e., 19 Tex. Sup. Ct. J. 17, 529 S.W.2d 67 (1975).

Notwithstanding UCC § 9-304(1), which provides that security interest in instruments (checks and money) can only be perfected by taking possession, under UCC § 9-306 properly perfected security

interest in collateral continued in proceeds of that collateral, including collections, money and checks being considered cash proceeds, and secured party's interest in cash proceeds continued into bank accounts in which debtor deposited collections in violation of security agreement, subject, however, to bank's rights as holder in due course. *Commercial Disct. Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

8. Perfection by filing.

Where debtor, as security for loan, assigned collateral notes secured by trust deeds to creditor, assignments were recorded in county where land was situated, but instruments were never delivered to creditors, remaining in physical possession of debtor at all times, and creditors did not file any type of security agreement or financing statement, interests claimed by creditors in collateral notes were never perfected under UCC § 9-304(1) and therefore were subordinated to rights of trustee in bankruptcy pursuant to UCC § 9-301. Although debtor was acting as some sort of collection agent for creditors by collecting payments on collateral notes and then paying over these funds owing on their own promissory notes to creditors, debtor acting as collection agent for creditors was not type of agent who could take possession of instruments for purposes of perfection under UCC §§ 9-304(1) and 9-305. *Huffman v. Wikle*, 550 F.2d 1228 (9th Cir. Cal. 1977).

Where manufacturing company, which had been making gun cabinets for another company under contract providing that such other company would furnish basic materials for cabinets, that it reserved title to such materials, and that it would buy assembled cabinets from manufacturer at reduced price, became insolvent and ceased operations after obtaining Small Business Administration loan from two banks that required manufacturer to execute security agreement in their favor in manufacturer's present and after-acquired inventory, and where such banks, after perfecting their security interests in such inventory by filing financial statements that were proper in form, content, and place of filing, attempted to enforce such security interests by taking posses-

sion of manufacturer's inventory, as against asserted interest therein of company supplying materials to manufacturer, (1) interest of supplier of materials was purchase-money security interest under UCC § 9-107(b); (2) such interest was not perfected under UCC § 9-304 by filing of financing statement concerning such materials and giving notice of claim thereto; and (3) under UCC § 9-312(3), such unperfected interest had no priority over perfected security interests of banks in such materials (which were part of manufacturer's inventory), where security interests of banks had properly attached under UCC § 9-204(1). *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

Where supplier sold truck body kits to debtor, but debtor failed to pay for kits, where bank loaned money to debtor and filed financing statement which listed body kits as collateral, but no separate written security agreement was entered into between bank and debtor, and where body kits were subsequently sold back to supplier and consigned to debtor under agreement giving supplier security interest in kits and supplier filed financing statement covering body kits: (1) bank's financing statement was not effective as security agreement, as required by UCC § 9-203(1)(b), since it did not contain language which specifically created or granted security interest in described collateral; (2) bank did not perfect its security interest in collateral by taking "possession" pursuant to UCC § 9-305, prior to time supplier filed its financing statement with secretary of state, although bank's employees were present on debtor's premises during morning of day during which supplier filed, since bank did not begin loading collateral into its truck until sometime after supplier filed; (3) fact that bank filed and then took possession of collateral did not give bank priority under "first to file" rule of UCC § 9-302(5)(a) since its interest had not attached under UCC § 9-204 prior to time bank took possession and bank could not combine elements of perfecting under filing method with elements under possession method to defeat rule of UCC § 9-305 that there can be no relation back of perfection date

when perfection is obtained through possession. *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. Kan. 1975).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

Since television set and tape player were consumer goods, filing was not necessary to perfect purchase money security interest of conditional seller who thus had priority over security interest of pawnbroker who subsequently took possession of goods as security for loan. *Kimbrell's Furn. Co. v. Friedman*, 261 S.C. 172, 198 S.E.2d 803 (1973).

9. Perfection by notification.

Letter by which owner of paintings and sculptures notified owner of art gallery, who had possession of paintings and sculptures pursuant to consignment agreement and who was thus bailee of paintings and sculptures, that owner had assigned proceeds from sale of paintings and sculptures to secured party, that such proceeds were to be paid to secured party's attorney, and that pre-existing consignment was to be irrevocable unless written release was given by secured party, adequately served to notify owner of gallery of secured party's rights in collateral and thus to perfect secured party's security interest in paintings and sculptures; this interest, perfected as it was before owner of paintings and sculptures filed petition in bankruptcy, took priority over trustee's interest in such objects. *Looney v. Nuss*, 545 F.2d 916 (5th Cir. Tex. 1977), reh'g denied, 548 F.2d 355 (5th Cir. Tex. 1977), cert. denied, 430 U.S. 987, 97 S. Ct. 1687, 52 L. Ed. 2d 382 (1977).

10. Effect of failure to perfect security interest.

Buyer's drafts, which described purchased beans by kind and quantity, vested title to beans in buyer under UCC § 7-504, where drafts were documents of title and represented sale of beans of type in which seller had title. Bank, which took possession of seller's assets as secured creditor for purpose of liquidating seller's business, gained no right to these beans by means of its security interest in the inventory of seller, where the beans represented by the warehouse receipt found in seller's safe were in possession of a third party and bank failed to perfect security interest as required by UCC § 9-304 in warehouse receipt. *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976).

11. Priorities.

In receivership proceedings involving conflicting petitions to reclaim assets of insolvent corporation, secured party which had loaned money to insolvent and had performed every act required by law to obtain perfected security interest in all of insolvent's receivables, including filing of financing statement pursuant to UCC §§ 9-302(1), 9-304(1), and 9-402(1), had priority over all unsecured general creditors, including investors in the insolvent corporation who held debentures and notes which stated on their face that they were subordinate to claims of all other contract creditors. *Coastal Fin. Corp. v. Coastal Fin. Corp.*, 120 R.I. 317, 387 A.2d 1373 (1978).

B. Decisions Under Former Statutes.

12. In general.

The legislature did not intend by the enactment of this section to subordinate the vendor's lien created by Code 1942, § 337, to the lien of a prior chattel mortgage on after-acquired property executed under the authority of this section, and thereby permit the holder of such prior chattel mortgage to take property that had not been paid for, while still in the hands of the first purchaser, and appropriate it to the payment of the chattel mortgage indebtedness and thereby defeat the vendor's purchase money lien. *Trenton*

Lumber Co. v. Boling, 230 Miss. 233, 92 So. 2d 440 (1957).

Where the holder of a mortgage deed of trust, covering after-acquired property of the purchaser, was charged with notice of the general custom of the lumber trade that planning mill operators, such as the purchaser, paid for rough lumber delivered at the mill by small operators at the end of the week rather than at the time of delivery, it was not in position to claim lack of notice that certain lumber delivered to purchaser by the vendors had not been paid for, and that it had a right to take the lumber and apply it to purchaser's indebtedness without making payment therefor, since the vendors had not lost their purchase money liens. *Trenton Lumber Co. v. Boling*, 230 Miss. 233, 92 So. 2d 440 (1957).

Under fifteen-year lease providing for lien on lessee's property for rent which

was payable monthly, indebtedness secured by lien held to arise within twelve months after its execution as required by statute, though rent was payable in installments. *Union Indem. Co. v. Shirley*, 170 Miss. 594, 150 So. 825 (1933).

Lessor's lien on property acquired within twelve months after execution of lease held superior to lien of deed of trust executed by lessee, though lessor's lien was intended to cover property to be acquired after expiration of twelve months. *Union Indem. Co. v. Shirley*, 170 Miss. 594, 150 So. 825 (1933).

Deed of trust may be given upon after-acquired chattel, acquired within twelve months thereafter; deed of trust given upon after-acquired chattel, acquired within twelve months thereafter, prevails over subsequent lien. *Tabb v. People's Bank & Trust Co.*, 160 Miss. 22, 133 So. 137 (1931).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 365, 366.

68A Am. Jur. 2d, Secured Transactions §§ 479 et seq.

78 Am. Jur. 2d, Warehouses §§ 35 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:551-9:553 (instruments, documents, and goods covered by documents).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3501 et seq (perfection of security interest).

CJS. 13 C.J.S., Carriers §§ 398-401.

Law Reviews. 1983 Mississippi Supreme Court Review: Article 9 priority provisions and right of set-off. 54 Miss. L. J. 105, March, 1984.

§ 75-9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) Except as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 75-8-301.

(b) With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in Section 75-9-316(d).

(c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of

the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under Section 75-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) or Section 75-8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides.

SOURCES: Former 1972 Code § 75-9-313 [Codes, 1942, § 41A:9-313; Laws, 1966, ch. 316, § 9-313; Laws, 1968, ch. 488, § 1; Laws, 1977, ch. 452, § 22; Laws, 1992, ch. 303, § 1, eff from and after July 1, 1992] is now found in comparable provisions enacted at §§ 75-9-334 and 75-9-604 by Laws, 2001, ch. 495, § 1. Present § 75-9-313 was derived from former 1972 Code §§ 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and 75-9-305 [Codes, 1942, § 41A:9-305; Laws, 1966, ch. 316, § 9-305; Laws, 1977, ch. 452, § 17; Laws, 1990, ch. 384, § 52, 1996, ch. 460, § 26; Laws, 1996, ch. 468, § 66, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Commercial paper, see §§ 75-3-101 et seq.

Letters of credit, see §§ 75-5-101 et seq.

Documents of title, see §§ 75-7-101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-305.

6. In general.
7. Goods.
8. Instruments.
9. Money.
10. Documents.
11. Chattel paper.
12. Possession by bailee or agent.
14. Continuity.
15. Effect on third parties.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-305.

6. In general.

Under UCC, parties to security agreement were free to decide who should have right to possession of collateral. *American Honda Motor Co. v. United States*, 363 F. Supp. 988 (S.D.N.Y. 1973).

Bare possession of checks was sufficient to create security interest under § 9-305. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

Under the statute, the actions of one seeking to repossess certain personal property from a defaulting vendee were insufficient to perfect the vendor's security interest. *L.B. Smith, Inc. v. Foley*, 341 F. Supp. 810 (W.D.N.Y. 1972).

7. Goods.

The filing of a financing statement is unnecessary to perfect a security interest in United States coins having a numismatic value in excess of their face value, pledged with and delivered to a bank as collateral for a loan; for such coins are to be considered as "goods" rather than as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), *aff'd*, 387 F.2d 118 (8th Cir. Mo. 1968).

8. Instruments.

In an action by a bank against a purchaser of truck bodies to obtain monies paid by the purchaser to the Internal Revenue Service after the IRS had issued a tax levy against funds owing to the seller of truck bodies, the trial court properly granted judgment for the bank where the contract between the seller and the purchaser had been delivered, assigned and accepted by the bank to secure a loan to the seller and, thereby, gave the bank a perfected security interest in the contract, an instrument under § 75-9-105, which held priority over the tax lien of the IRS which had never been filed at the principal place of business of the taxpayer. *International Harvester Co. v. Peoples Bank & Trust Co.*, 402 So. 2d 856 (Miss. 1981).

Where a security interest in the proceeds of promissory notes was perfected before the holder of that interest received notice of the existence of a previously filed Internal Revenue Service lien, the holder's right to the proceeds of the notes is not affected by the lien. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where two certificates of deposit were indorsed in blank by owners and delivered to bank to enable third party to obtain line of credit from bank; where in connection with delivery of certificates, owners thereof also simultaneously executed two instruments entitled "Consent to Pledge" and "Security Agreement-Pledge" which specifically described collateral (the two certificates of deposit) for proposed extension of credit by bank; and where bank in reliance on such instruments and delivery of the collateral advanced desired line of credit to third party, effect of transaction under UCC § 9-304(1) and § 9-305 was to create and perfect valid security interest in certificates in favor of bank which was enforceable under UCC § 9-203(1). *Montavon v. Alamo Nat'l Bank*, 554 S.W.2d 787 (Tex. Civ. App. 1977).

When bank surrendered possession of note which it had held as security for loan for more than a year, bank lost security interest which it had previously held. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972).

9. Money.

Financing statements are not required to be filed to perfect possessory security interest in money; security interests in money can only be perfected by possession. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

A bankruptcy debtor's pre-petition payment to law firms, and their retention of retainers without further action, created valid security interest in favor of law firms; perfection of security interest was achieved by law firms' continuous possession of debtor's funds, subject to the statute of frauds and amounts of compensation actually allowed by court. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

Retainers paid by bankruptcy debtor to law firms pre-petition, in which law firms had security interest perfected through possession, were nullified by statute of frauds only to extent that compensation for firm was earned and expenses incurred more than 15 months after firm obtained retainer. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

A security interest in money (either originally given or received as proceeds from the negotiation of an instrument) is perfected by possession, and a deposit made by lessee with lessor to secure performance of lease could be set off against lessor's claim against bankrupt lessee. *In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

10. Documents.

Where corporation's stock was physically endorsed by guarantor and voluntarily delivered to corporation as security pursuant to terms of guarantee agreement, and where corporation's receiver subsequently took possession of stock certificates as officer of court and pursuant to statutory authority, such possession was necessary to maintain corporation's secu-

rity interest in stock under UCC §§ 9-304 and 9-305, and could not be considered prejudgment seizure of property. *State ex rel. Hunt v. Liberty Investors Life Ins. Co.*, 543 P.2d 1390 (Okla. 1975).

Service of order of attachment, which was later vacated, upon garnishee in possession of stock certificates was insufficient to perfect assignee's security interest in stock and to place garnishee and assignor's creditor on notice that assignee had secured interest in shares, whereas garnishee and assignor's creditor, by possession, did properly perfect their security interests under UCC § 9-305. *Friedman v. Fein*, 46 A.D.2d 886 (2d Dep't 1974).

11. Chattel paper.

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for \$180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior \$60,000 debt, indorsed them to creditor's order, and delivered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor \$135,000 on notes and notes were still in creditor's possession as collateral for payment of \$28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus due to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it, delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25,

1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first creditor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned to plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff nor its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) because of first creditor's failure to indorse them to plaintiff's order. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Under UCC § 9-305, possessory security interest in ordinary chattel paper requires no filing for perfection. *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 371 N.E.2d 523 (1977).

12. Possession by bailee or agent.

Although debtor was acting as some sort of collection agent for creditors by collecting payments on collateral notes and then paying over these funds owing on their own promissory notes to creditors, debtor acting as collection agent for creditors was not type of agent who could take possession of instruments for purposes of perfection under UCC §§ 9-304(1) and 9-305. *Huffman v. Wickle*, 550 F.2d 1228 (9th Cir. Cal. 1977).

Letter by which owner of paintings and sculptures notified owner of art gallery, who had possession of paintings and sculptures pursuant to consignment agreement and who was thus bailee of paintings and sculptures, that owner had assigned proceeds from sale of paintings and sculptures to secured party, that such proceeds were to be paid to secured party's attorney, and that pre-existing consignment was to be irrevocable unless written release was given by secured party, adequately served to notify owner of gallery of secured party's rights in collateral and thus to perfect secured party's security interest in paintings and sculptures; this interest, perfected as it was before owner of paintings and sculptures filed petition in bankruptcy, took priority over trustee's interest in such objects. *Looney v. Nuss*, 545 F.2d 916 (5th Cir. Tex. 1977), reh'g denied, 548 F.2d 355 (5th Cir. Tex. 1977), cert. denied, 430 U.S. 987, 97 S. Ct. 1687, 52 L. Ed. 2d 382 (1977).

Security interest of creditor in stock placed in escrow three years prior to filing of bankruptcy by debtor was perfected prior to bankruptcy filing since delivery to escrow company was sufficient to comply with notice requirements of "bailee in possession" provisions under UCC § 9-305; thus creditor's interest was superior to that of debtor as debtor in possession even though delivery of stock by escrow company to creditor occurred after bankruptcy. *In re Copeland*, 531 F.2d 1195 (3d Cir. Del. 1976).

Where physical possession of stock certificates was voluntarily given up by debtor and placed with escrow holder with agreement and acquiescence of secured creditor, as collateral security for debtor's guarantee of certain loans, pursuant to simultaneously executed pledge and escrow agreements, effective notice to other potential creditors was same as if secured creditor had taken possession of stock certificates; thus, for purpose of perfecting security interest within meaning of UCC § 9-305, escrow holder had possession of certificates as bailee with notice such that secured creditor was "deemed to have [had] possession" as of date of execution of agreements and delivery of stock to escrow holder, and prior to date on which debtor filed petition in bankruptcy. *In re Copeland*, 391 F. Supp. 134 (D. Del. 1975), vacated on other grounds, 531 F.2d 1195 (3d Cir. Del. 1976).

In replevin action brought by finance company against garage owner, trial court erred in giving priority to finance company's chattel mortgage where it was not shown that such chattel mortgage had been perfected by filing and where, on other hand, garage owner had perfected his interest in automobile since he had possession of it. *Henson v. Government Emp. Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974).

Where supplier sold truck body kits to debtor, but debtor failed to pay for kits, where bank loaned money to debtor and filed financing statement which listed body kits as collateral, but no separate written security agreement was entered into between bank and debtor, and where body kits were subsequently sold back to supplier and consigned to debtor under agreement giving supplier security interest in kits and supplier filed financing statement covering body kits: (1) bank's financing statement was not effective as security agreement, as required by UCC § 9-203(1)(b), since it did not contain language which specifically created or granted security interest in described collateral; (2) bank did not perfect its security interest in collateral by taking "possession" pursuant to UCC § 9-305, prior to time supplier filed its financing statement with secretary of state, although

bank's employees were present on debtor's premises during morning of day during which supplier filed, since bank did not begin loading collateral into its truck until sometime after supplier filed; (3) fact that bank filed and then took possession of collateral did not give bank priority under "first to file" rule of UCC § 9-302(5)(a) since its interest had not attached under UCC § 9-204 prior to time bank took possession and bank could not combine elements of perfecting under filing method with elements under possession method to defeat rule of UCC § 9-305 that there can be no relation back of perfection date when perfection is obtained through possession. *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. Kan. 1975).

Where collateral held by a bank was transferred to it well before filing of notice of a federal tax lien, the bank's right to retain its security interest is unchallenged. *In re Bushway Estate*, 107 N.H. 135, 218 A.2d 49 (1966).

14. Continuity.

Failure of creditor with perfected purchase money security interest to renew original filing relegated creditor to standing of unperfected secured creditor; creditor did not reperfect its purchase money lien upon repossession of collateral, due to 20-day perfection requirement. *United States v. Williams*, 82 B.R. 430 (Bankr. N.D. Miss. 1988).

Where seller of bookbinding machine gave machine to common carrier in New York, and common carrier issued non-negotiable bill of lading naming Maryland buyer as consignee, and no evidence was presented to show that carrier received notice of seller's purchase money security interest, seller's perfection under Code § 9-305, if it existed at all, did not "continue" when binder was removed from New York to Maryland. *In re Automated Bookbinding Servs., Inc.*, 471 F.2d 546 (4th Cir. Md. 1972).

Where security interest was perfected by filing a financing statement, but no continuation statement was filed, effectiveness of original statement lapsed five years after initial filing and, as result, security interest became unperfected under UCC § 9-403(2), (3); however, lapse of

effectiveness of financing statement, while vitiating perfection, had no effect on viability of security agreement itself; thus, where secured party took possession of collateral one day before debtor executed assignment for benefit of creditors, taking of possession by secured party constituted perfection of security interest under UCC §§ 9-302(1)(a), 9-305 and 9-503 which rendered it superior to right therein of assignee. *Rosner v. Plaza Hotel Assocs.*, 146 N.J. Super. 447, 370 A.2d 41 (App. Div. 1977).

15. Effect on third parties.

Sale of unfinished textile fabrics by converter (i.e., one who finishes textiles into dyed and patterned fabrics) to another converter was in ordinary course of first converter's business within meaning of

UCC § 9-307(1), even though predominant business purpose of converters was converting of unfinished textiles into finished fabrics, and thus second converter took fabric free from manufacturer's security interest in textiles, although manufacturer's security interest was perfected by possession of goods under UCC § 9-305, where it was shown that converters often purchased unfinished textiles in excess of their requirements, selling such excess through brokers to other converters, and that converters buy such goods if price is satisfactory or particular goods are not available from manufacturers, both of which conditions were satisfied in present case. *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 39 N.Y.2d 632, 350 N.E.2d 590 (1976).

RESEARCH REFERENCES

ALR. Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer. 53 A.L.R.2d 936.

Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, be-

tween secured creditor and bank claiming right of setoff. 3 A.L.R.4th 998.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 109 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:561-9:563 (possession without filing).

§ 75-9-314. Perfection by control.

(a) A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under Section 75-9-104, 75-9-105, 75-9-106, or 75-9-107.

(b) A security interest in deposit accounts, electronic chattel paper or letter-of-credit rights is perfected by control under Section 75-9-104, 75-9-105, or 75-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) A security interest in investment property is perfected by control under Section 75-9-106 from the time the secured party obtains control and remains perfected by control until:

- (1) The secured party does not have control; and
- (2) One (1) of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

SOURCES: Former 1972 Code § 75-9-314 [Codes, 1942, § 41A:9-314; Laws, 1966, ch. 316, § 9-314, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-335 by Laws, 2001, ch. 495, § 1. Present § 75-9-314 was derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and former 1972 Code § 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Description of property, see § 75-9-108.
Definitions, see § 75-9-201.

§ 75-9-315. Secured party's rights on disposition of collateral and in proceeds.

(a) Except as otherwise provided in this article and in Section 75-2-403(2):

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by Section 75-9-336; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.

(c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

(A) A filed financing statement covers the original collateral;

(B) The proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) The proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) when the security interest attaches to the proceeds or within twenty (20) days thereafter.

(e) If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subsection (d)(1) becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under Section 75-9-515 or is terminated under Section 75-9-513; or

(2) The twenty-first day after the security interest attaches to the proceeds.

SOURCES: Former 1972 Code § 75-9-315 [Codes, 1942, § 41A:9-315; Laws, 1966, ch. 316, § 9-315, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-336 by Laws, 2001, ch. 495, § 1. Present § 75-9-315 was derived from former 1972 Code § 75-9-306 [Codes, 1942, § 41A:9-306; Laws, 1966, ch. 316, § 9-306; Laws, 1977, ch. 452, § 18; Laws, 1996, ch. 468, § 67, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Course of dealing and trade usage, see § 75-1-205.

Right of seller's creditor to treat sale or identification of goods to contract for sale as void, see § 75-2-402(2).

Power to transfer, see § 75-2-403.

Right of the debtor to use collateral, see § 75-9-205.

Ineffective restrictions, see §§ 75-9-408, 75-9-409.

Indication of collateral in financing statement, see § 75-9-504.

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E. Rights as to Returned or Repossessed Goods.

35. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-306.

A. In General; "Proceeds".

6. Generally; excluded transactions.

Insurance payments made because of casualty loss of collateral are "proceeds"

pursuant to provision of UCC § 9-306(1) added effective July, 1978, which includes "insurance payable to a person other than a party to the security agreement"; where automobile accident occurred in 1975, language of UCC § 9-306(1) is not relevant and UCC § 9-104(g), which states that UCC Art 9 does not apply to a transfer of an interest or claim in or under any insurance policy is applicable. *First Nat'l Bank v. Merchant's Mut. Ins. Co.*, 49 N.Y.2d 725, 402 N.E.2d 1168 (1980).

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between

plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion-the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

"Proceeds," as used in UCC § 9-306(2), means the payment (or agreed-on exchange) by the transferee (purchaser) of the collateral to the transferor (debtor), and not proceeds from the transferee's resale of the collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Security agreement between cattle buyer and bank included all cattle buyer's inventory and all livestock and feed; security agreement provided that cattle buyer would not dispose of collateral other than in ordinary course of business; held, plaintiff on whose behalf cattle buyer purchased cattle and who reimbursed cattle buyer took title to cattle free and clear of any lien interest of bank. *Swift & Co. v.*

Jamestown Nat'l Bank, 426 F.2d 1099 (8th Cir. N.D. 1970).

The purpose of the criminal provisions in this section as enacted in Illinois is to prevent the disposition of the security by the mortgagor to the injury of the mortgagee. *First Nat'l Bank v. Padjen*, 61 Ill. App. 2d 310, 210 N.E.2d 332 (1st Dist. 1965).

Subdivision (2) of this section cannot be extended to provide the holder of a financing agreement on an automobile with a lien interest in the proceeds derived from a tort action for property damages resulting from an accident, and the holder's security remains solely the depreciated automobile. *Hoffman v. Snack*, 37 Pa. D. & C.2d 145 (1964).

7. Insurance as proceeds.

Insurance payments made because of casualty loss of collateral are "proceeds" pursuant to provision of UCC § 9-306(1) added effective July, 1978, which includes "insurance payable to a person other than a party to the security agreement"; where automobile accident occurred in 1975, language of UCC § 9-306(1) is not relevant and UCC § 9-104(g), which states that UCC Art 9 does not apply to a transfer of an interest or claim in or under any insurance policy is applicable. *First Nat'l Bank v. Merchant's Mut. Ins. Co.*, 49 N.Y.2d 725, 402 N.E.2d 1168 (1980).

Security interest of bank and federal Small Business Administration in collateral given to secure payment of loan made by bank, which was filed under Texas UCC prior to filing of notice of federal tax lien on insurance funds received when collateral was destroyed by fire, was perfected before attachment of federal tax lien to such funds and continued to exist in such funds as proceeds of the destroyed collateral pursuant to definition of "proceeds" in UCC § 9-306(1). *Aetna Ins. Co. v. Texas Thermal Indus.*, 436 F. Supp. 371 (E.D. Tex. 1977), *aff'd*, 591 F.2d 1035 (5th Cir. Tex. 1979).

Under amended version of UCC § 9-306(1), proceeds of insurance on collateral are "proceeds of collateral," since they are merely the collateral in another form. *Aetna Ins. Co. v. Texas Thermal Indus.*, 436 F. Supp. 371 (E.D. Tex. 1977), *aff'd*, 591 F.2d 1035 (5th Cir. Tex. 1979).

In dispute over insurance fund that came into existence because of destruction of mortgaged building and personal property therein, where United States claimed fund by virtue of tax lien filed against mortgagor and mortgagee claimed that such lien could not attach to fund because it did not constitute property belonging to mortgagor, and that even if tax lien could attach to fund, mortgagee had security interest therein that was valid as against the tax lien, court held (1) that disputed fund belonged to mortgagor, and (2) that even though fund belonged to mortgagor, mortgagee was nevertheless entitled thereto because he held perfected security interest therein under UCC § 9-306(1), dealing with "proceeds" from sale or other disposition of collateral, which interest existed before filing of the federal tax lien. *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949 (5th Cir. Fla. 1978).

Because original version of UCC § 9-306(1), dealing with proceeds on disposition of collateral, can reasonably be construed to include insurance payable because of loss of or damage to collateral, the 1972 amendment of the statute, which expressly states that insurance payable by reason of loss of or damage to collateral is "proceeds," is a persuasive indication of the effect that original version of the statute was intended to have. *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949 (5th Cir. Fla. 1978).

Insurance monies paid for loss of collateral by theft are "proceeds" within meaning of UCC § 9-306(1). *Insurance Mgt. Corp. v. Cable Servs., Inc.*, 359 So. 2d 572 (Fla. App. 1978).

Under security agreement granting creditor security interest in inventory and equipment and further providing that debtor would maintain insurance policy on collateral with creditor as payee, and providing that security interest was to continue in proceeds from inventory, creditor had valid security interest in proceeds of fire insurance policy upon destruction of inventory under UCC § 9-306(1), where party's clear intention was to give secured party benefit of insurance proceeds; UCC § 9-104(g), providing that Article Nine does not apply "to a transfer of an interest or claim in or under any

policy of insurance" is applicable only in situations where parties to security agreement attempt to create direct security interest in insurance policy by making policy itself immediate collateral securing transaction, and not to situations where security agreement creates both direct security interest in inventory and/or equipment and requires debtor to provide his creditor with further protection by insuring collateral. *PPG Indus., Inc. v. Hartford Fire Ins. Co.*, 531 F.2d 58 (2d Cir. N.Y. 1976).

Proceeds from fire insurance policy covering secured collateral constituted "proceeds" within meaning of UCC § 9-306(1), and hence were subject to secured party's security interest, where security agreements required debtor to procure insurance on collateral in favor of secured party, "proceeds" box in both security agreements was checked, rider to second security agreement assigned all sums payable under such insurance to secured party as further security for its loan, and rider was attached to insurance policy making loss payable to secured party "as interests may appear." *Firemen's Fund Am. Ins. Co. v. Ken-Lori Knits, Inc.*, 399 F. Supp. 286 (E.D.N.Y. 1975).

In view of policy considerations behind Article 9, as well as policy of 26 USCS § 6323 to give preference to security interests as defined by that provision, creditor had security interest in proceeds of insurance which took precedence over government's tax lien where creditor had security interest in debtor's inventory and where parties intended proceeds of insurance on that collateral to be further security for loan. *PPG Indus., Inc. v. Hartford Fire Ins. Co.*, 384 F. Supp. 91 (S.D.N.Y. 1974), *aff'd*, 531 F.2d 58 (2d Cir. N.Y. 1976).

Under UCC § 9-306(2) secured party had right to require debtors to turn over to secured party for application on note proceeds of insurance check issued for damages to machinery rather than allowing debtors to use proceeds to repair machinery. *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976), review denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

8. —Not proceeds.

Insurance covering auto destroyed by fire in 1975 was not "proceeds" within the meaning of UCC § 9-306 as such statute read prior to amendment effective July 2, 1978. *First Nat'l Bank v. Merchant's Mut. Ins. Co.*, 49 N.Y.2d 725, 402 N.E.2d 1168 (1980).

Because original version of UCC § 9-306(1), dealing with proceeds on disposition of collateral, can reasonably be construed to include insurance payable because of loss of or damage to collateral, the 1972 amendment of the statute, which expressly states that insurance payable by reason of loss of or damage to collateral is "proceeds," is a persuasive indication of the effect that original version of the statute was intended to have. *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949 (5th Cir. Fla. 1978).

Where (1) first buyer of dry cleaning and laundry equipment violated security agreement with seller by not procuring insurance on equipment, (2) first buyer later sold equipment to another buyer, who procured insurance on it before it was destroyed by fire, and (3) insurer refused to pay insurance proceeds to secured creditor of first buyer, court held that secured creditor had no right to such proceeds under UCC § 9-306(1) because (1) purpose of UCC § 9-306(1) is to declare secured party's right to proceeds, including insurance proceeds, that are received by debtor on debtor's disposal of collateral, and (2) in present case, insurance proceeds were not received by secured party's debtor (first buyer). *McGraw-Edison Credit Corp. v. Allstate Ins. Co.*, 62 A.D.2d 872 (2d Dep't 1978).

A secured creditor has no statutory right to recover insurance proceeds directly from the insurer of the debtor's buyer; section 9-306 of the Uniform Commercial Code was enacted to state a secured party's right to proceeds received by the debtor on disposition of the collateral, and, effective July 2, 1978 (L 1977, ch 866), it was specifically amended to provide that "Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement", thus making it clear

that a secured creditor has a statutory right to share in insurance proceeds payable to the debtor, but not in insurance proceeds payable to a third party. *McGraw-Edison Credit Corp. v. Allstate Ins. Co.*, 62 A.D.2d 872 (2d Dep't 1978).

B. Security Interest as Continuing.

9. In general.

Under the Uniform Commercial Code, title to goods passes at delivery, with only the reservation of a security interest by the seller permitted (Uniform Commercial Code, § 2-401, subd [1]); rules on chattel mortgages and conditional sales are now governed by article 9 of the code, and are considered as a single security device and, while under section 9-306 a security interest continues in any identifiable proceeds of collateral covered by the security agreement and a third party may be liable in conversion for paying those proceeds without satisfying the secured party's interest, there is no justification for extending the statute to include a cause of action within the meaning of identifiable proceeds. Accordingly, in a negligence action by plaintiff bank against defendant driver of a borrowed car in which the bank had a security interest, which car was destroyed in an accident, allegedly because of defendant's negligence, defendant was granted summary judgment since plaintiff failed to state a cause of action. *Bank of N.Y. v. Margiotta*, 99 Misc. 2d 423 (1979).

Although UCC § 9-311 provides that debtor's rights in collateral may be voluntarily or involuntarily transferred, such provision must be read together with UCC § 9-306(2) which provides that security interest continues in collateral, notwithstanding sale, exchange, or other disposition thereof by debtor, unless debtor's action was authorized by secured party in security agreement or otherwise. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

Under UCC § 9-306(2) and Official Comment 2(c), transferees in the ordinary course of the debtor's business take free of a security interest in proceeds. However, the security interest in proceeds continues until the funds are actually transferred in the ordinary course of business. *Citizens*

Nat'l Bank v. Mid-States Dev. Co., 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

Under UCC § 9-311, transfer by debtor of property which is subject to a security interest is not wrongful in itself and does not result in an automatic default. Moreover, under UCC § 9-306(2), debtor's sale of the property does not destroy or affect continuing validity of creditor's security interest. *Production Credit Ass'n v. Equity Coop Livestock Sales Ass'n*, 82 Wis. 2d 5, 261 N.W.2d 127 (1978).

When a debtor makes an unauthorized disposition of collateral, the security interest in most cases continues, under UCC § 9-306(2), in original collateral in the hands of the purchaser or other transferee. And since the transferee takes the collateral subject to the security interest therein, the secured party may repossess the collateral from him or, in an appropriate case, maintain an action for conversion. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Where secured party entered into security agreement with partnership engaged in appliance business, covering "all present inventory belonging to the Dealer as well as any and all subsequently acquired inventory," where partnership assets were subsequently transferred to newly formed corporation, and where new financing statement was filed under name of partnership but was not filed with reference to corporation as debtor, security agreement containing after-acquired property clause was effective against newly-formed corporation and secured party's security interest extended to inventory subsequently acquired by corporation; fact that financing statement was filed under partnership name, "Clint's Appliance Sales and Service," rather than corporate name, "Clint's Appliance Sales and Service, Inc.," would not cause secured party's security interest to be unprotected against either corporation or trustee in bankruptcy; but, even if it could be said that financing statement was in some way misleading, under UCC § 9-402(7) (1972 Official Text) secured party's security interest remained perfected under its financing statement with partnership at least four months after partner-

ship changed its "name, identity or corporate structure." *Fliegel v. Associates Capital Co.*, 272 Or. 434, 537 P.2d 1144 (1975).

Where secured party's security interest continued in bowling equipment after it was sold to purchaser, purchaser acquired seller's interest in equipment with knowledge of secured party's claim and pending replevin action, purchaser was bound by replevin judgment, notwithstanding purchaser was not party to replevin action, and process could issue under replevin judgment to put secured party in possession of equipment. *S.T. Enters., Inc. v. Brunswick Corp.*, 57 Ill. 2d 461, 315 N.E.2d 1 (1974).

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Proceeds extended to unpaid purchase price for collateral, notwithstanding claim that accounts receivable did not constitute proceeds from collateral but proceeds from contract right. *Farnum v. C.J. Merrill, Inc.*, 264 A.2d 150 (Me. 1970).

Rejecting the contention of a buyer of an automobile from a dealer without notice of

a prior security interest that UCC § 2-403(1) provided an escape from the prior security interest, the court held that UCC § 9-306(2) which provides for the continuation of the security interest except when "this Article" provides otherwise limited any exceptions to those contained in Article 9. *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

10. "Sale, exchange, or other disposition".

Perfected security interest in television equipment survived transfer of equipment pursuant to reorganization even though creditor failed to amend financing statement to indicate new name of corporation where transfer was not a sale, exchange or disposition but merely involved a change of corporate name. *In re Kittyhawk Tel. Corp.*, 75 Ohio Op. 2d 469, 516 F.2d 24 (6th Cir. Ohio 1975).

Where secured party had perfected purchase money security interest in television equipment which it sold to debtor, subsequent transfer of all assets and liabilities of debtor corporation to newly formed corporation having same shareholders, officers and directors as debtor did not constitute "sale, exchange, or other disposition" of secured property within meaning of UCC § 9-306(2); thus, financing statement which was properly filed continued to be effective after transfer of assets and liabilities, although no amendment to financing statement was made to reflect change in name of debtors, where name change was minor and not seriously misleading, and financing statement was accurate in every other detail. *In re Kittyhawk Tel. Corp.*, 75 Ohio Op. 2d 469, 516 F.2d 24 (6th Cir. Ohio 1975).

Where truck dealer ordered two trucks from manufacturer, trucks were delivered under "floor plan" arrangement with

manufacturer whereby dealer executed note and security agreement covering trucks, which was assigned to credit company, where purchaser executed two security agreements and notes for purchase of trucks which were assigned by dealer to purchaser's finance company, but where delivery of trucks to purchaser was delayed and, in fact, purchaser never made cash down payment and never actually took possession of trucks there was, nonetheless, sale of trucks when purchaser executed security agreements and notes; thus, security interest obtained by purchaser's lender took priority over security interest in trucks held by dealers credit company. *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974).

Where president and principal shareholder of automobile dealership purchases car from his own company, that sale will be considered to be sale "in ordinary course of business" if it is similar in all material respects to sale to any other retail customer; and where that is the case, lien held by bank which has security agreement covering dealership's inventory is released by sale, and purchase money security interest prevails. *Crystal State Bank v. Columbia Heights State Bank*, 295 Minn. 181, 203 N.W.2d 389 (1973).

Where a debtor sells collateral subject to a perfected security interest, the secured party may proceed (1) against the debtor (a) to collect the debt or (b) assert his rights to any identifiable proceeds in the hands of the debtor; or (2) against the purchaser by (a) repossession of the purchased goods in person or by an action of replevin or (b) by an action of trespass for conversion of the collateral. Once the purchaser has resold the collateral, the secured party has no contract right of action against the purchaser, either for the original debt or for the proceeds of the sale. *Beneficial Fin. Co. v. Colonial Trading Co.*, 43 Pa. D. & C.2d 131 (1967).

11. Transfer not in ordinary course.

In marital property-division proceeding, trial court had authority under UCC § 9-311, providing that debtor's rights in collateral may be voluntarily or involuntarily transferred by judicial process, to

direct husband to transfer title to bonds, which had been pledged as security for loan, to wife. However, any title that was involuntarily transferred by judicial order would be subject, under UCC § 9-306(2), to security interest created by the pledge, since wife, as party to suit in which such transfer was made, was not buyer in ordinary course of business under UCC §§ 1-201(9) and 9-307(1) who could take collateral (bonds) free of pledgee's security interest therein. *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App. 1978).

Under UCC § 9-306(2) and Official Comment 2(c), transferees in the ordinary course of the debtor's business take free of a security interest in proceeds. However, the security interest in proceeds continues until the funds are actually transferred in the ordinary course of business. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

Purchaser of automobile covered by security interest was liable to secured party for conversion where automobile dealer, who was indebted to purchaser for \$10,000, gave purchaser check for \$5,000 in partial satisfaction of such debt, and purchaser indorsed check back to dealer in payment for automobile: (1) when dealer executed and delivered check to purchaser, it did not alter fact that dealer was still indebted to purchaser for \$10,000 and indorsed check back to dealer in payment for automobile, transaction constituted transfer of automobile for or in partial satisfaction of money debt and purchaser was not, therefore, "buyer in ordinary course of business" within meaning of UCC § 1-201(9), whether or not he acted in good faith and whether or not at time he received check he intended to exchange it for automobile; (2) since purchaser was not "buyer in ordinary course of business" he did not take automobile free from security interest under UCC § 9-307(1), but took it subject thereto under UCC § 9-306(2), and he converted secured party's security interest when he took possession of car through unauthorized sale by dealer, removed it from dealer's place of business in violation of terms of security agreement, and began driving it as his family car. *Chrysler Credit Corp.*

v. Malone, 502 S.W.2d 910 (Tex. Civ. App. 1973).

Where defendant pawnshop purchased television sets from debtor who was not in business of selling television sets, and later resold them, defendant pawnshop was liable to secured party with purchase money security interest, despite fact that security interest was never recorded. *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658 (Tex. Civ. App. 1972).

12. Unauthorized disposition.

Where (1) bank advanced loan, guaranteed by Federal Small Business Administration, to owner of business, (2) bank secured loan by perfected security interest in all of debtor's furniture, fixtures, machinery, and equipment, (3) bank filed financing statement which listed debtor's corporation as debtor, and (4) such corporation, without knowledge or consent of bank or SBA as secured creditors, sold collateral subject to creditors' security interest to second corporation which became bankrupt and had its assets sold at public auction, court held (1) that bankruptcy judge committed error in ruling that although bank and SBA did not impliedly or expressly consent to transfer of collateral to second corporation, failure of bank and SBA to file financing statement naming second corporation as debtor rendered bank's and SBA's previously perfected security interest ineffective against second corporation, and (2) that under Cal UCC § 9-306(2), stating that security interest continues in collateral notwithstanding its sale by debtor unless disposition was authorized by secured party, and Cal UCC § 9-402(6), providing that filed financing statement remains effective with respect to collateral transferred by debtor, even though secured party knows of or consents to such transfer, security interest of bank and SBA clearly survived subsequent transfer of collateral to second corporation. *United States v. Ocean Elecs. Corp.*, 451 F. Supp. 511 (S.D. Cal. 1978).

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for

\$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral-in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion-the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present

case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

When a debtor makes an unauthorized disposition of collateral, the security interest in most cases continues, under UCC § 9-306(2), in original collateral in the hands of the purchaser or other transferee. And since the transferee takes the collateral subject to the security interest therein, the secured party may respossess the collateral from him or, in an appropriate case, maintain an action for conversion. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Under the Uniform Commercial Code, it is clear that a secured party cannot sue for conversion of the collateral as a result of its disposition by the debtor, unless such disposition was unauthorized, since under UCC § 9-306(2), a disposition that was authorized by the secured party will result in loss of the security interest in the collateral itself and in retention of a security interest only in identifiable proceeds. In most cases, however, the security agreement itself will define default to include any unauthorized disposition of the collateral, thus entitling the secured party to sue for its conversion. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Where bank had perfected security interest in cattle under agreement which prohibited sale of collateral without bank's prior written approval and where farmer sold cattle without such approval, security interest survived sale pursuant to UCC § 9-306(2) and buyers were liable

for conversion, even though in prior transactions with debtor bank had not objected to such sales of collateral, as UCC § 1-205(4) provides that course of dealings may be used to interpret terms of agreement but not to contradict them. *Wabasso State Bank v. Caldwell Packing Co.*, 308 Minn. 349, 251 N.W.2d 321 (1976).

Under UCC § 9-306, security interest of bank in equipment continued upon transfer of equipment by debtor to his solely owned corporation, where evidence established that secured party did not authorize the transfer. *Bank of Virginia-Central v. Taurus Constr. Co.*, 30 N.C. App. 220, 226 S.E.2d 685 (1976), cert. denied, 290 N.C. 659, 228 S.E.2d 450 (1976).

Code does not prevent secured party from attaching conditions or limitations to its consent to sales of collateral by debtor; and if sale by debtor violates conditions imposed, sale is unauthorized and security interest continues in collateral. *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

Where a manufacturer of garden supplies distributed its products only through authorized dealers and its financing subsidiary took trust receipts on the goods sold expressly prohibiting dealers to resell except to authorized consumers, and the security interest had been established according to law, goods purchased from a dealer by a discount house with knowledge of provisions of the trust receipt took the same subject to the manufacturer's security interest. *O.M. Scott Credit Corp. v. Apex Inc.*, 97 R.I. 442, 198 A.2d 673 (1964).

Subsection (2) of this section provides for the continuation of a security interest in proceeds derived from an unauthorized "sale, exchange, or other disposition of property," but it cannot be extended to include instances where property has not been transferred, but has simply become depreciated through no fault of the debtor, and absent a sale, exchange, or other disposition, there can be no proceeds such as this section contemplates, and the creditor's security remains solely in the depreciated personal property still in the debtor's possession. *Hoffman v. Snack*, 37 Pa. D. & C.2d 145 (1964).

13. Authorized disposition; waiver.

Where bank, which had perfected security interest in debtor's cattle, agreed to extension of time for performance of debtor's contract to sell cattle to third party but later, after realizing that proceeds from such sale would not be sufficient to pay off bank's loan to debtor, foreclosed on cattle in debtor's possession and sold them to such third party, third party in suit against bank for contract interference could not successfully contend that bank had waived its security interest in cattle under UCC § 9-306(2), which provides that security interest continues in collateral notwithstanding its "sale, exchange, or other disposition" unless "the disposition was authorized by the secured party," since no sale, exchange, or other disposition of the cattle was ever actually made to such third party that would bring UCC § 9-306(2) into operation. *Weisbart & Co. v. First Nat'l Bank*, 568 F.2d 391 (5th Cir. Tex. 1978).

Following acquiescence in, and sale of, the collateral, the farm-products lender stands on the same footing as the inventory financier. Under UCC § 9-306(2) and UCC § 9-307(1), neither has a continuing security interest in the collateral. However, each retains a threshold of protection because his security interest attaches to the proceeds of the sale. *Weisbart & Co. v. First Nat'l Bank*, 568 F.2d 391 (5th Cir. Tex. 1978).

Lender which permitted its debtor to sell collateral from time to time as debtor chose, and relied upon debtor to bring in proceeds from sale, declining to exercise its right to require debtor to include lender's name as payee on checks representing proceeds of sale of collateral, acquiesced in and consented to sale and lost its security interest pursuant to Code § 9-306(2). *United States v. Central Livestock Ass'n*, 349 F. Supp. 1033 (D.N.D. 1972).

Alleged statement of Farmers Home Administration agent that supply corporation-seller would be able to look to farming proceeds of supply buyer did not rise to level of waiver of Administration's security interest in proceeds under Code § 9-306(2). *United States v. Greenwich Mill & Elevator Co.*, 17 Ohio Misc. 71, 291 F. Supp. 609 (N.D. Ohio 1968).

UCC § 9-306(2) codifies the common-law waiver. However, although prior course of dealing, without more, is not sufficient to waive written agreement to the contrary in light of UCC § 1-205(4), any course of performance or other conduct subsequently to the agreement can amount to a waiver. *Southwest Wash. Prod. Credit Ass'n v. Seattle-First Nat'l Bank*, 19 Wash. App. 397, 577 P.2d 589 (1978), overruled on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

Under UCC § 9-306(2), a security interest continues in the collateral after it is sold, unless the sale was authorized by the secured party. Therefore, in the absence of an authorized transfer, the buyer takes the property subject to the security interest therein, and the secured party can maintain an action against him. The defenses available to the buyer in such a case are (1) that the secured party authorized the sale, and (2) that the secured party waived its security interest. *Montgomery v. Fuquay-Mouser, Inc.*, 567 S.W.2d 268 (Tex. Civ. App. 1978).

In suit by lender against auctioneer for conversion of cattle constituting lender's collateral by sales in which proceeds were remitted only to debtor, (1) provisions in security agreement specifically authorizing debtor to sell cattle and other collateral with lender's prior written consent, or with payment made jointly to debtor and lender, did not violate UCC § 1-205(4) or § 9-306(2), and did not constitute either express waiver of lender's security interest in cattle or express consent to sales complained of; (2) lender under UCC § 1-205(4) did not impliedly consent to such cattle sales, and thus impliedly waive its security interest, by its course of conduct in allowing debtor to sell other collateral in debtor's name, receive payment therefor, and remit proceeds to lender without admonishing debtor for his violation of security agreement's provisions; (3) lender's statement to debtor that he could sell cattle "providing he applied the proceeds from that sale" constituted express consent to sell cattle in manner not designated in security agreement; and (4) defendant auctioneer, as debtor's agent, required same right to sell that debtor possessed, thus rendering auctioneer not

liable for conversion. *North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co.*, 223 Kan. 689, 577 P.2d 35 (1978).

Under the Uniform Commercial Code, it is clear that a secured party cannot sue for conversion of the collateral as a result of its disposition by the debtor, unless such disposition was unauthorized, since under UCC § 9-306(2), a disposition that was authorized by the secured party will result in loss of the security interest in the collateral itself and in retention of a security interest only in identifiable proceeds. In most cases, however, the security agreement itself will define default to include any unauthorized disposition of the collateral, thus entitling the secured party to sue for its conversion. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

In action for conversion of milk and sale proceeds thereof, where (1) perfected security agreement covering contract for sale of cows and dairy equipment provided that secured party would have lien on all milk produced by cows, that all milk should be sold by defendant who was not party to sales contract, and that defendant should pay specified monthly sum from proceeds of such sales to secured party, and (2) where defendant notified secured party that authorization to pay contained in security agreement was not acceptable as assignment of sales proceeds and requested secured party to memorialize such agreement on forms acceptable to defendant, but secured party never complied with such request, court would hold (1) that under UCC § 9-306(2), authorization in security agreement for sale of milk (collateral) waived any interest of secured party in proceeds of collateral; (2) under UCC § 9-318(3), defendant had right to make reasonable request that secured party furnish proof of assignment of proceeds of sales; and (3) since such proof was never furnished, no assignment was ever made. *Raley v. Milk Producers, Inc.*, 90 N.M. 720, 568 P.2d 246 (Ct. App. 1977), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severably liable on note as co-maker under UCC § 3-

118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collateral where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. *Beneficial Fin. Co. v. Marshall*, 551 P.2d 315 (Okla. Ct. App. 1976).

Where bank which had security interest in crops grown on farm authorized sale of corn crop, lien was lost; and buyer who made final payment for corn by check payable only to owner of farm had no obligation or liability to bank. *Farmers Nat'l Bank v. Ceres Land Co.*, 32 Colo. App. 290, 512 P.2d 1174 (1973).

Where security agreement did not require written consent of bank prior to sale of secured cattle, and bank acknowledged general course of dealing permitting debtor to sell hogs and horses which had served as collateral for previous loans, evidence supported finding that bank consented to sale of cattle. *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973).

Where sale of collateral is authorized, lien is divested and purchaser takes property free of it, even if he had actual notice of security interest and was unaware it was waived. *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973).

Effect of creditor's waiver upon its right to recover proceeds of conversion.—Where a bank, holding a perfected security interest in certain cattle, had, by its course of conduct, permitted acquiesced in, and consented to the debtor making a series of sales of the security through defendant's commission house and market agency, waived its possessory rights to the extent that the sales did not constitute a wrongful conversion by the defendant, and when the debtor failed to remit the proceeds of the sales to the bank it was not entitled to recover such proceeds from the defendant. *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

14. —Manner of authorizing disposition.

Although security agreement covering livestock expressly prohibited debtor from selling collateral without written consent

of secured party, debtor had implied authority to sell collateral free from security interest under UCC § 9-306(2) where, from beginning of secured party's relationship with debtor, sales of livestock pledged as collateral were made to various livestock dealers, and where secured party had knowledge of this, raised no objection, accepted checks from these sales for credit to debtor's account, and clearly relied on debtor's honesty to properly account for proceeds; this established course of dealing which constituted authority to sell livestock free from security interest, notwithstanding claim that, under UCC § 1-205(4), express terms of security agreement prohibiting sale controlled. *Hedrick Sav. Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975).

In action by secured creditor against purchaser of collateral which arose when debtor failed to account for proceeds of sale, issue of fact existed as to whether creditor had consented, under UCC § 9-306(2), to sale of collateral, either directly or impliedly by its prior course of conduct. *Central Wash. Prod. Credit Ass'n v. Baker*, 11 Wash. App. 17, 521 P.2d 226 (1974).

Order directing seizure of tractors and trailers which were listed as collateral in security agreement and which had been sold by debtor to defendants could not stand where there was factual question as to whether, under UCC § 9-306(2), creditor, by reason of its prior dealings with debtor, had authorized it to sell chattels free of any liens by asserting its right to receive "proceeds" if chattels were sold. *Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118 (2d Dep't 1974).

Written security agreement providing that debtor would not sell or otherwise dispose of collateral without prior written consent of secured party controlled over evidence of trade usage or course of dealings with respect to determination whether sale of collateral was impliedly authorized by inclusion of proceeds as collateral. *United States v. E.W. Savage & Son*, 343 F. Supp. 123 (D.S.D. 1972), *aff'd*, 475 F.2d 305 (8th Cir. S.D. 1973).

Motion for summary judgment denied in action for conversion of tobacco crop pledged as security for loan; held, lack of diligence on part of FHA in protecting its

rights in tobacco crop, i.e. failure to notify warehouseman of its lien, fell short of implied authority to debtor and warehouseman to dispose of collateral free of security interest. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

15. —Good faith; knowledge.

Although security agreement covering livestock expressly prohibited debtor from selling collateral without written consent of secured party, debtor had implied authority to sell collateral free from security interest under UCC § 9-306(2) where, from beginning of secured party's relationship with debtor, sales of livestock pledged as collateral were made to various livestock dealers, and where secured party had knowledge of this, raised no objection, accepted checks from these sales for credit to debtor's account, and clearly relied on debtor's honesty to properly account for proceeds; this established course of dealing which constituted authority to sell livestock free from security interest, notwithstanding claim that, under UCC § 1-205(4), express terms of security agreement prohibiting sale controlled. *Hedrick Sav. Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975).

Sale of collateral was not in violation of security interest where contract of sale existed prior to security interest and, at time security agreement was executed, secured party had knowledge of and acquiesced in sale; held, buyer takes free of security interest created by seller in favor of secured party. *First Fin. Co. v. Akathiotis*, 110 Ill. App. 2d 377, 249 N.E.2d 663 (1st Dist. 1969).

16. —Collusion, fraud, or the like.

Missouri courts would not permit defendant bank to retain amount debited outside usual course of business and thereby defeat security interest of plaintiff in identifiable proceeds of sale of 6 automobiles, where evidence indicated that debtor asked bank to debit his account for amount owed to bank and refused to writ bank check for amount indicating that he wished to keep plaintiff from collecting on previously issued checks, and debiting transaction transpired after close of bank's business. *Universal C.I.T. Credit*

Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973).

17. Identifiable proceeds.

Under the Uniform Commercial Code, title to goods passes at delivery, with only the reservation of a security interest by the seller permitted (Uniform Commercial Code, § 2-401, subd [1]); rules on chattel mortgages and conditional sales are now governed by article 9 of the code, and are considered as a single security device and, while under section 9-306 a security interest continues in any identifiable proceeds of collateral covered by the security agreement and a third party may be liable in conversion for paying those proceeds without satisfying the secured party's interest, there is no justification for extending the statute to include a cause of action within the meaning of identifiable proceeds. Accordingly, in a negligence action by plaintiff bank against defendant driver of a borrowed car in which the bank had a security interest, which car was destroyed in an accident, allegedly because of defendant's negligence, defendant was granted summary judgment since plaintiff failed to state a cause of action. *Bank of N.Y. v. Margiotta*, 99 Misc. 2d 423 (1979).

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in

which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion—the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

Under the Uniform Commercial Code, it is clear that a secured party cannot sue for

conversion of the collateral as a result of its disposition by the debtor, unless such disposition was unauthorized, since under UCC § 9-306(2), a disposition that was authorized by the secured party will result in loss of the security interest in the collateral itself and in retention of a security interest only in identifiable proceeds. In most cases, however, the security agreement itself will define default to include any unauthorized disposition of the collateral, thus entitling the secured party to sue for its conversion. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833 (Tenn. Ct. App. 1977).

Perfected security interest in cattle feed did not, in and by itself, extend under UCC § 9-315(1) and UCC § 9-307(1) to cattle which ate such feed since feed, after being eaten, not only lost its identity under UCC § 9-315(1), but also ceased to exist within meaning of UCC § 9-315(1) and UCC § 9-307(1). Moreover, cattle which ate feed did not constitute "proceeds" thereof within meaning of UCC § 9-306(1) and (2). *First Nat'l Bank v. Bostron*, 39 Colo. App. 107, 564 P.2d 964 (1977).

Where secured party had perfected security interest in all of debtor's present and future accounts and contract rights, including proceeds therefrom, where debtor obtained purchase orders for shoes from buyer and assigned purchase orders to export-import company, and where export-import company performed purchase orders and delivered shoes to buyer, account generated by export-import company's performance of debtor-buyer contract did not constitute "proceeds" of that contract within meaning of UCC § 9-306. *American E. India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3d Cir. Pa. 1978).

Description of collateral as crops and "proceeds" from crops was sufficient to include federal subsidy payments to which debtor became entitled. In *re Munger*, 495 F.2d 511 (9th Cir. Cal. 1974).

Where debtor cattle raiser sold livestock to slaughtering company which sold carcasses to meat packer, secured party's security interest in debtor's livestock covered "proceeds" of carcasses in hands of packing company, so that checks paid by

packing company to bank which financed slaughtering company were "proceeds" subject to secured party's security interest, even though they were paid to bank rather than to seller or to debtor. *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

Buyer traded in trucks as partial payment for new trucks from dealer which had knowledge of seller's unperfected security interest in trucks; held, since trucks were "proceeds" of sale of original chattels, seller retained rights against new trucks; but dealer's purchase money security interest in new trucks was superior to seller's unperfected security interest, even though dealer had knowledge of this interest. *Noble Co. v. Mack Fin. Corp.*, 107 R.I. 12, 264 A.2d 325 (1970).

18. —Proceeds acquired with cash proceeds.

Corporate officers of debtor were not personally liable for conversion of proceeds from sale of inventory in which creditor had perfected security interest under UCC § 9-306(3)(a) where security agreement, rather than requiring creditor to segregate specific proceeds of each sale from debtor's general funds, merely required debtor to pay "amounts due." *Independence Disct. Corp. v. Bressner*, 47 A.D.2d 756 (2d Dep't 1975).

19. —Express terms of security agreement.

Since bank did not have security agreement covering after-acquired property, it was not entitled to proceeds from sale of cattle here in question. *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971), on remand, 125 Ga. App. 126, 186 S.E.2d 542 (1971).

20. —Claim of interest in financing statement.

Declaration in financing statement that "proceeds of collateral are also covered" extended to unpaid purchase price for collateral, notwithstanding contention that accounts receivable did not constitute proceeds from collateral but proceeds from contract right. *Farnum v. C.J. Merrill, Inc.*, 264 A.2d 150 (Me. 1970).

Code requirement that creditor add "proceeds" in his financing statement can-

not be used to imply estoppel or waiver of lien security interest or consent to sell free of security interest. *Vermilion County Prod. Credit Ass'n v. Izzard*, 111 Ill. App. 2d 190, 249 N.E.2d 352 (4th Dist. 1969).

A creditor whose collateral consisted of present and future inventory and accounts receivable who failed to claim "proceeds" in its financing statement had been negligent and grossly misleading, and such failure was prejudicial to the creditor's claim to proceeds of accounts receivable as against the rights of creditors who filed subsequent financing statements. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

21. —Collections received by debtor.

Under UCC §§ 9-306(2) and 9-307(1), secured party's perfected security interest in cotton crop followed debtor's sale of crop to cotton buyer, and buyer was liable to secured party for any sums paid debtor for such cotton that debtor had not remitted to secured party. *Oxford Prod. Credit Ass'n v. Dye*, 368 So. 2d 241 (Miss. 1979).

In dispute between executrix of debtor's estate and creditor claiming security interest in bank account, security agreement identifying collateral as all existing and after-acquired contract rights and all proceeds of all such contract rights and accounts owned by debtor was sufficient to create security interest in after-acquired property under UCC § 9-204, and sums collected by executrix on accounts and contract rights of decedent were clearly "proceeds" under UCC § 9-306(1). *Barnett Bank v. Fletcher*, 290 So. 2d 533 (Fla. App. 1974).

Notwithstanding UCC § 9-304(1), which provides that security interest in instruments (checks and money) can only be perfected by taking possession, under UCC § 9-306 properly perfected security interest in collateral continued in proceeds of that collateral, including collections, money and checks being considered cash proceeds, and secured party's interest in cash proceeds continued into bank accounts in which debtor deposited collections in violation of security agreement, subject, however, to bank's rights as holder in due course. *Commercial Disct. Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

Since creditor's security interest included "proceeds" from collateral pledged as security, its interest attached to checks received by debtor from sale of debtor's business. *Standard Acceptance Co. v. United States*, 342 F. Supp. 45 (N.D. Ill. 1972).

22. —Commingled proceeds.

Where (1) bank had perfected security interest in original debtor corporation's inventory, fixtures, and equipment, including after-acquired property, which was superior to lien later obtained by junior lienor under promissory note secured by same collateral, (2) original debtor corporation defaulted on notes given to bank (senior lienor) and to junior lienor, (3) junior lienor without informing bank took over assets of original debtor corporation, transferred them to newly formed corporation, began selling the original inventory which had become commingled with new inventory, and, with respect to original debtor corporation's assets, filed foreclosure complaint against bank and former owners of original debtor corporation alleging that he had taken possession of original debtor corporation's property, subject to bank's security interest, and was seeking to discharge obligation owed to bank in order to become owner of such property, and (4) bank filed complaint in replevin and took possession of collateral, trial court's judgment in favor of bank—which held that bank's security interest was at all times paramount to junior lienor's lien, that after-acquired property clause in bank's security agreement with original debtor corporation covered items that junior lienor had added in his operation of business under new corporation, and that bank should sell collateral, satisfy its own security interest from sale proceeds, and give remaining proceeds to junior lienor—was affirmed because (1) bank's after-acquired property clause effectively covered inventory and proceeds of both original debtor corporation and new corporation, (2) bank's security interest continued in collateral, including after-acquired property, under UCC § 9-306(2) and § 9-311, which must be read together, and (3) since junior lienor, on default of original debtor corporation, did not proceed in accordance with

UCC § 9-505(2) in attempting to retain collateral, disposition of collateral ordered by trial court was proper. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

Where security agreement providing that creditor would have security interest in inventory of retailer and in proceeds of sale of each item of inventory did not impose duty upon retailer to pay over to creditor specific proceeds of sale of each item covered by agreement, but merely provided that upon sale or other disposition of any item of inventory, retailer was obligated to immediately pay amounts due to creditor, there was no specific fund from which payment had to be made, and thus corporate officer's commingling of proceeds of sales with other funds was not conversion of proceeds. *Independence Dist. Corp. v. Bressner*, 47 A.D.2d 756 (2d Dep't 1975).

Where bank held security interest in mobile home dealer's inventory and proceeds from sales thereof, where debtor commingled proceeds of sale from home in its corporate checking account, and where judgment creditor of debtor levied execution on bank account, under UCC § 9-306(1), secured party's security interest in mobile home continued in proceeds of sale of home, and secured party was entitled to trace proceeds subject to security interest into debtor's bank account. *Michigan Nat'l Bank v. Flowers Mobile Homes Sales, Inc.*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

Tobacco supplier that retained continuing security interest in all of tobacco dealer's current and future inventory of supplier's products, accounts receivable arising from sale of such products and all products and proceeds of foregoing, did not lose its security interest in proceeds from sale of its products by permitting such proceeds to be commingled with other funds in wholesaler's corporate bank account; hence, supplier was entitled to recover such proceeds from bank where bank transferred such funds from wholesaler's account to itself outside ordinary course of business. *Brown & Williamson Tobacco Corp. v. First Nat'l Bank*, 504 F.2d 998 (7th Cir. Ill. 1974).

Mere fact that proceeds from sales of 6 secured automobiles were commingled

with other funds and subsequent withdrawals were made from commingled account would not render proceeds unidentifiable under Missouri law. *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973).

C. Perfection as to Proceeds.

23. In general; sufficiency of original filing.

Where debtor was corporation that operated retail clothing store, where secured party acquired perfected purchase money security interest in debtor's inventory including its proceeds and after-acquired property, where debtor corporation merged with other corporations, each operating retail clothing outlets, and, finally, where surviving corporation entered into assignment for benefit of creditors: (1) secured party had valid security interest in after-acquired inventory of debtor, notwithstanding that at time of assignment for benefit of creditors surviving corporation did not have in its possession any inventory purchased from secured party by surviving corporation for any of its constituent corporations; (2) after-acquired property clause extended to property acquired by surviving corporation after merger; and (3) financing statement on file at time of assignment for benefit of creditors was not deficient though it did not contain name of debtor-assignor. However, secured party did not have security interest in the proceeds of inventory from other stores not covered by security agreement. *Inter Mt. Ass'n of Credit Men v. Villager, Inc.*, 527 P.2d 664 (Utah 1974).

A bank which had filed its financing statement with the New Jersey Secretary of State had perfected its security interest in five items of self-propelled earth moving equipment, although it had not filed a financing statement with the Director of Division of Motor Vehicles, an act required by state statute as a condition precedent to the perfection of a security interest in "motor vehicles" (a term defined in the statute to include self-propelled earth moving equipment), the court holding that despite the statutory definition, the term "motor vehicle" was not intended to embrace machinery which normally operates at construction sites even though literally

it perhaps can be used to transport persons on a highway. In *re Ferro Contracting Co.*, 380 F.2d 116 (3d Cir. N.J. 1967), cert. denied, 389 U.S. 974, 88 S. Ct. 475, 19 L. Ed. 2d 466 (1967).

24. —Notation on certificate of title.

Where (1) bank on December 30, 1974 made loan to debtor to purchase Chevrolet truck, took purchase-money security interest in truck to secure loan, and security agreement executed by debtor on December 30, 1974 covered collateral's proceeds, (2) debtor traded in Chevrolet truck for Ford truck and received title to Ford truck on June 30, 1975, (3) United States seized Ford truck on July 7, 1975 for debtor's delinquent taxes, (4) debtor, on July 8, 1975, executed agreement with bank substituting Ford truck as collateral for loan, but bank's first security interest was not noted on Ford truck's certificate of title until July 28, 1975, (5) United States sold Ford truck on July 29, 1975 for debtor's delinquent taxes, and (6) under Iowa law, perfection with respect to noninventory vehicle, such as truck in suit, could only occur by noting security interest on vehicle's certificate of title, tax lien of United States had priority over bank's lien under UCC § 9-306(3)(c) because, even assuming that date on which debtor received Ford truck was June 30, 1975, bank clearly had not perfected its security interest in such truck, which was "proceeds" of original collateral (Chevrolet truck), by expiration of ten-day period specified in UCC § 9-306(3)(c) (that is, by July 10, 1975). *Security Sav. Bank v. United States*, 440 F. Supp. 444 (S.D. Iowa 1977).

Although a bank which had noted its security interest on a DX title to an automobile lost its lien upon the vehicle when it was sold by a dealer in the ordinary course of business, it retained a security interest in the proceeds of the sale under the provisions of subsec. (2). *Associates Disct. Corp. v. Old Freeport Bank*, 421 Pa. 609, 220 A.2d 621 (1966).

A creditor with a perfected security interest in a truck was entitled to either the truck or the proceeds thereof under this section, where the creditor, who had the security interest of a seller under an installment sale contract, had perfected its security interest by noting the encum-

brance on the certificate of title to the truck. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

25. Temporary interests.

Where bank had perfected security interest in debtor's personal property, debtor sold secured property and on same date, judgment creditor levied on sale proceeds, UCC § 9-306(3) provided for continued perfection in proceeds for period of 10 days after sale which defeated judgment lien arising during that period, even though bank allowed perfected security interest to lapse by failing to perfect within 10 day period. *Blair Milling & Elevator Co. v. Wehrkamp*, 217 Kan. 122, 535 P.2d 457 (1975).

26. Appropriate steps as to proceeds.

Where (1) automobile dealer obtained Small Business Administration loan from plaintiff bank and executed security agreement in bank's favor covering dealer's shop equipment, furniture, fixtures, accounts receivable, and inventory, except new cars, (2) bank filed financing statement on November 26, 1974 in county chancery clerk's office but not with office of secretary of state, (3) dealer on February 20, 1975 granted security interest in same collateral to defendant credit corporation to cover dealer's indebtedness for new cars, and such security interest was properly perfected, (4) at time defendant's branch manager removed collateral from dealer's premises, dealer informed him that collateral was subject to bank's security interest, and (5) branch manager did not check records in county chancery clerk's office to determine whether bank's financing statement covering such collateral had been filed, court held that information given by dealer to defendant's branch manager constituted knowledge of contents of bank's financing statement within meaning of UCC § 9-401(2), so as to perfect bank's security interest in collateral and render it superior to that of defendant. *Chrysler Credit Corp. v. Bank of Wiggins*, 358 So. 2d 714 (Miss. 1978).

Ten-day grace period as to proceeds specified by UCC § 9-306(3)(c) merely allows previous creditor time to reperfect his secured interest and assure his prior-

ity over other creditors of the debtor. The statute does not mean that other creditors cannot file a lien on the debtor's "proceed collateral" during that period. *Security Sav. Bank v. United States*, 440 F. Supp. 444 (S.D. Iowa 1977).

27. —Filing.

Lien creditor's claim to proceeds of notes, which were pledged to secured party, took precedence over secured party's claim to such proceeds where financing statement covering such proceeds was filed in wrong place. *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974).

Claim of A was entitled to priority over claim of B because, before B took judgment against C, A had perfected its security interest in that crop in accordance with UCC provision relating to filing of "financing statement" covering proceeds of that crop. *West Coast Beet Seed Co. v. Polk County Farmers Coop.*, 261 Or. 381, 494 P.2d 880 (1972).

Creditor properly filed financing statement covering inventory and proceeds; held, this was sufficient to put everyone on notice that creditor's claim extended to proceeds, including accounts resulting from sale of inventory on credit. *Matthews v. Arctic Tire, Inc.*, 106 R.I. 691, 262 A.2d 831 (1970).

D. Insolvency Proceedings.

28. In general.

In bankruptcy proceeding, meat packer's finance agency which had perfected security interest in packer's assets had priority over cash sellers of cattle as to proceeds of sale of meat from cattle in packer's possession. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Where security agreement expressly provided that filing of petition in bankruptcy was event constituting default, holder of security interest had right upon default to take control of all proceeds of collateral under UCC §§ 9-306 and 9-501 et seq., including right to receive and retain all subsequent lease payments. *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976).

The limiting provisions of UCC § 9-306(4)(d)(i) and (ii) are intended to serve

as tracing rules for a secured party asserting an interest in proceeds only when the proceeds are brought within the debtor's estate in an insolvency proceeding. The limitations have no operation outside the area of insolvency proceedings. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

29. Identifiable proceeds; non-cash.

Where security agreement expressly provided that filing of petition in bankruptcy was event constituting default, holder of security interest had right upon default to take control of all proceeds of collateral under UCC §§ 9-306 and 9-501 et seq., including right to receive and retain all subsequent lease payments. *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976).

30. —Separate deposit account.

In dispute over funds in segregated bank account into which bankrupt debtor deposited cash proceeds from after acquired inventory accounts receivable, contract rights, and general intangibles relating to production and sale of microwave ovens, secured creditor prevailed over judgment creditor where security agreement was effective between parties and against creditors under UCC § 9-201 and moneys in account constituted identifiable noncommingled cash proceeds under UCC § 9-306(4). *Salzer v. Victor Lynn Corp.*, 114 N.H. 29, 315 A.2d 185 (1974).

31. —Cash proceeds.

In action between home appliance dealer's trustee in bankruptcy and secured creditor, UCC § 9-306(4) provision allowing debtor to pay secured creditor from comingled funds during 10 days before bankruptcy to extent that debtor has received cash proceeds within that period was not extended to benefit secured creditor who had persuaded failing business to remit almost 10 times amount of current proceeds from secured collateral to detriment of other secured creditors who were paid nothing; secured creditor's interest in amount not greater than amount of "any cash proceeds" under UCC § 9-306(4)(d)(ii) was limited to cash proceeds from sale of collateral in which creditor

had security interest. *Fitzpatrick v. Philco Fin. Corp.*, 491 F.2d 1288 (7th Cir. Ill. 1974).

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32. Commingled proceeds.

The limiting provisions of UCC § 9-306(4)(d)(i) and (ii) are intended to serve as tracing rules for a secured party asserting an interest in proceeds only when the proceeds are brought within the debtor's estate in an insolvency proceeding. The limitations have no operation outside the area of insolvency proceedings. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 177 Ind. App. 548, 380 N.E.2d 1243, 3 A.L.R.4th 987 (1978).

Where bank held security interest in mobile home dealer's inventory and proceeds from sales thereof, where debtor commingled proceeds of sale from home in its corporate checking account, and where judgment creditor of debtor levied execution on bank account, under UCC § 9-306(1), secured party's security interest in mobile home continued in proceeds of sale of home, and secured party was entitled to trace proceeds subject to security interest into debtor's bank account. *Michigan Nat'l Bank v. Flowers Mobile Homes Sales, Inc.*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

33. —Setoff.

A security interest in money (either originally given or received as proceeds

from the negotiation of an instrument) is perfected by possession, and a deposit made by lessee with lessor to secure performance of leases could be set off against lessor's claim against bankrupt lessee. In *re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

34. —Computing amount recoverable.

In action between home appliance dealer's trustee in bankruptcy and secured creditor, UCC § 9-306(4) provision allowing debtor to pay secured creditor from comingled funds during 10 days before bankruptcy to extent that debtor has received cash proceeds within that period was not extended to benefit secured creditor who had persuaded failing business to remit almost 10 times amount of current proceeds from secured collateral to detriment of other secured creditors who were paid nothing; secured creditor's interest in amount not greater than amount of "any cash proceeds" under UCC § 9-306(4)(d)(ii) was limited to cash proceeds from sale of collateral in which creditor had security interest. *Fitzpatrick v. Philco Fin. Corp.*, 491 F.2d 1288 (7th Cir. Ill. 1974).

E. Rights as to Returned or Repossessed Goods.

35. In general.

Where auto has been returned to or repossessed by seller who had assigned security interest therein, it is necessary for secured party (assignee) to reperfect security interest for protection against purchasers or creditors of seller-assignor under new Ohio provision, not in Official UCC, dealing with goods that have been repossessed or returned to dealer by purchaser. *Osborn v. First Nat'l Bank*, 472 P.2d 440 (Okla. 1970).

RESEARCH REFERENCES

ALR. Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been

improper repossession or foreclosure after damage. 46 A.L.R.2d 992.

What constitutes secured party's authorization to transfer collateral free of lien

under UCC § 9-306(2). 37 A.L.R.4th 787.

Secured transactions: government agricultural program payments as "proceeds" of agricultural products under UCC § 9-306. 79 A.L.R.4th 903.

What constitutes lack of "adequate protection" of interest in property of estate for which relief may be granted from automatic stay provision of Bankruptcy Code of 1978 (11 USCS § 362(a)). 66 A.L.R. Fed. 505.

Determining amount of payments to secured creditor who is to receive, in installments, present value of property under Chapter 13 cram-down provision (11 USCS § 1325(a)(5)(B)) of Bankruptcy Code of 1978. 68 A.L.R. Fed. 537.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 962-982.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:361-9:367 (proceeds; rights on disposition of collateral).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3511 et seq. ("proceeds"; secured party's rights on disposition of collateral).

CJS. 79 C.J.S., Secured Transactions §§ 118 et seq.

72 C.J.S., Pledges § 31.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-316. Continued perfection of security interest following change in governing law.

(a) A security interest perfected pursuant to the law of the jurisdiction designated in Section 75-9-301(1) or 75-9-305(c) remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four (4) months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one (1) year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) The collateral is located in one (1) jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) Thereafter the collateral is brought into another jurisdiction; and

(3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Except as otherwise provided in subsection (e), a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) A security interest described in subsection (d) becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under Section 75-9-311(b) or 75-9-313 are not satisfied before the earlier of:

(1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or

(2) The expiration of four (4) months after the goods had become so covered.

(f) A security interest in deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) The time the security interest would have become unperfected under the law of that jurisdiction; or

(2) The expiration of four (4) months after a change of the applicable jurisdiction to another jurisdiction.

(g) If a security interest described in subsection (f) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

SOURCES: Former 1972 Code § 75-9-316 [Codes, 1942, § 41A:9-316; Laws, 1966, ch. 316, § 9-316, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-339 by Laws, 2001, ch. 495, § 1. Present § 75-9-316 was derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of certain liens arising from operation of law. See § 75-9-333.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

A. In General.

6. Generally.

7. Controlling law.

8. —Conflict of laws.

9. —Agreement of parties.

10. Perfection.

11. —Filing in debtor's principal place of business.

12. Security interest in accounts and contract rights.

13. Miscellaneous.

B. Mobile Goods.

14. Generally.
15. Incoming goods subject to security interest.
16. Four month rule.
17. —Priority.
18. —Lapse of perfection.
19. —Particular examples.
20. Thirty day rule.
21. Movement of property covered by certificate of title.
22. —Title to nontitle state.
23. —Nontitle to title state.
24. —Between title states.
25. —Between nontitle states.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103.

A. In General.

6. Generally.

This section deals with accounts, contract rights and equipment relating to another state, and incoming goods already subject to a security interest. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

The institution of distraint proceedings obviously does not fall within the intentment of this section. *Herman v. Osgood*, 103 Pitts. Legal J. 231 (Pa. 1955).

7. Controlling law.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evi-

dence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (applying New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1)

and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Recognition of the title certificate issued in the state of origin and perfection of the security interest noted thereon can continue only as long as the title certificate of the state of origin is the only certificate. Once a new certificate is issued in a second state, it becomes, under UCC § 9-103(4), “the jurisdiction which issued the certificate,” and its law governs the perfection of a security interest. The underlying rationale of UCC § 9-103(4) is that there shall be only one title certificate for an automobile, which is that originally issued if it is still in existence. However, once a second certificate of title has been issued by a second state, it is the law of the second state which determines whether a perfected security interest exists in the vehicle, and the creditor must comply with the law of the second state in order to perfect his security interest. In *re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

The exclusiveness of the Vehicle Code registration and transfer requirements for perfection of security interests in automobiles is provided for under the Uniform Commercial Code § 9103(4). *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28 (4th Dist. 1968).

In a case where the issue was to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity or perfection of the security interest were not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

In a case where the issue is as to whether a buyer was in default under a contract of sale so as to give the seller a right to repossess the article sold, and where there is no issue as to the validity or perfection of a security interest, the question as to which law is to be applied to the transaction is governed by § 1-105(1) of the instant chapter and not by subsection (2) of the instant section. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

8. —Conflict of laws.

UCC § 9-102(1) intends that the substantive law of the place where the collateral is located governs without regard to possible contracts in other jurisdictions (see UCC § 9-102, Official Comment 3, and UCC § 9-103, Official Comment 1). However, the general situs rule of UCC § 9-102(1) is not without its exceptions, as is noted by the specific reference in UCC § 9-102(1) to § 9-103. Section 9-103, in turn, although it is not definitive for all multistate transactions, does lay down a great number of specific choice-of-law rules regarding creation, perfection, and priorities in multistate transactions. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (construing New Jersey law).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between

seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. *In re Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Large earth-moving trucks unquestionably belong in classification of "road building equipment", "construction machinery", "automotive equipment", or all these

classifications; held, where it is conceded that debtor has chief place of business in Colorado, law of that state, including law on conflicts, must govern with respect to conflicting claims to trucks taken as trade-in by dealer in connection with sale of other construction equipment to buyer in good faith. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969) (applying Colorado law).

If chief place of business of debtor is not in this state, law, including conflict-of-law rules, of jurisdiction where such chief place of business is located governs perfection of security interest and possibility and effect of proper filing with regard to construction machinery. *GECC v. Western Crane & Rigging Co.*, 184 Neb. 212, 166 N.W.2d 409 (1969).

By adopting Illinois law, contract adopted Illinois conflicts rule of law, so that validity of security interest in goods under contract was to be determined by Indiana law, where goods were taken into Indiana within 30 days of attachment of security interest and where parties understood that property would be kept in Indiana. *In re Kokomo Times Publishing & Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968).

Where it had not adopted the Uniform Trust Receipts Act, the State of Georgia would not be bound to accept the procedural aspects of the Tennessee Act relative to recordation. *Chattanooga Disct. Corp. v. West*, 219 F. Supp. 140 (N.D. Ala. 1963) (applying Georgia law).

9. —Agreement of parties.

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in question, the law of the state of the domicile or place of business of the contracting party in question is controlling. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

10. Perfection.

Where (1) automobile was purchased in Illinois on November 11, 1971, and purchase-money security interest attached on that date in favor of plaintiff or his as-

signor, (2) original purchaser on November 12, 1971 sold such automobile in Alabama and gave buyer bill of sale therefor, (3) Illinois seller, on November 18, 1971, filed application for certificate of title, listing thereon plaintiff's security interest, (4) Illinois certificate of title was issued on November 30, 1971, and showed plaintiff's lien dated November 11, 1971, and (5) automobile was resold in Alabama to defendants on December 8, 1971, Alabama court would reject, in light of express provisions of UCC § 9-302(3) and (4), defendants' contention that Alabama UCC § 9-103(4) did not apply to case because Illinois certificate-of-title law did not require indication on certificate of title of any security interest in the property as a condition of perfection, since so to do would require too narrow an interpretation of phrase "condition of perfection" contained in Alabama UCC § 9-103(4). Instead, court would hold that it was sufficient for purposes of Alabama UCC § 9-103(4) if law of another state, such as Illinois in present case, required that all certificates of title have indicated thereon any security interests in the property, regardless of whether such indication was "condition of perfection" or whether state official was under statutory duty to indicate security interests before issuing certificate of title. *Lightfoot v. Harris Trust & Sav. Bank*, 357 So. 2d 654 (Ala. 1978) (Also rejecting defendants' content on that Alabama UCC § 9-103(4) was inapplicable because Illinois certificate of title had not been issued when vehicle entered Alabama, since such interpretation would nullify "relation-back" features of Illinois certificate-of-title law).

Secured party who had perfected security interest on property in South Dakota, but who did not file and perfect his interest in Iowa within four-month period after goods were transported to Iowa, had junior interest to buyer for value who purchased goods within four-month period, but who had no knowledge or notice of security interest, after lapse of four months without perfection of security interest in Iowa. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974) (citing annotation; applying Iowa law).

Plaintiff had properly filed security agreement perfecting security interest;

defendant later perfected security interest by taking possession pursuant to agreement giving defendant right to use machine at issue until completion of work; held, plaintiff was entitled to machine when purchaser filed petition for arrangement under Bankruptcy Act while machine was in defendant's possession. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970) (applying New Jersey law).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

11. —Filing in debtor's principal place of business.

In conversion action to determine priority of security interests in bulldozer and right to proceeds from its sale, where (1) bulldozer was sold in Michigan to Michigan buyer which gave seller an Indiana address, (2) buyer at time of sale was authorized to do business in Indiana and was mainly engaged in developing Indiana property, (3) seller assigned its security agreement listing bulldozer as collateral to plaintiff, and plaintiff filed financing statement with Indiana secretary of state, (4) defendant thereafter obtained security interest in bulldozer under security agreement with buyer, who listed it as collateral for loan from defendant, and filed financing statement with Michigan secretary of state, and (5) plaintiff then filed financing statement in Michigan after defendant's filing, court held (1) that Indiana was buyer's "chief place of business" under UCC § 9-103(2), (2) that Indiana therefore was proper place to file financing statement to perfect security interest in bulldozer, and (3) that since only plaintiff had perfected its security interest in Indiana, judgment was properly entered in plaintiff's favor. *Associates Fin. Servs. Co. v. First Nat'l Bank*, 82 Mich. App. 495, 266 N.W.2d 490 (1978).

In appeal by secured party from order of trustee in bankruptcy, Kansas was debtors' "chief place of business" under UCC § 9-103(2) where debtors at all times resided and conducted their business affairs there, where truck was garaged there

when not in interstate travel, and where only connection with Oklahoma was fact that lessee of truck had its home office there; although secured party was not required to force purchasers to register used truck in Kansas under UCC § 9-302(4), where Kansas certificate of title was not obtained and truck was instead registered in Oklahoma, secured party was in same position as if truck had never been certificated in Kansas and filing of financing statement in Oklahoma, without filing security agreement in Kansas, was insufficient to entitle secured party to reclaim sales proceeds of truck. *In re Dobbins*, 371 F. Supp. 141 (D. Kan. 1973) (applying Kansas law).

The mobility of tractors, normally used in more than one jurisdiction, makes filing in debtor's principal place of business necessary under UCC § 9-103(2) in order to perfect security interest therein, and bank which had not so filed could not prevail over tractor buyer's judgment creditor who levied against tractors in possession of buyer. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Where New Jersey was chief place of business of debtor which had entered into security agreement as to traxcavator, a heavy construction machine, rights of parties were governed by New Jersey law. *Foley Mach. Co. v. John T. Brady Co.*, 62 Misc. 2d 777 (1970).

12. Security interest in accounts and contract rights.

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

13. Miscellaneous.

Since Illinois vehicle code provided exclusive means of perfecting and giving

notice of security interest in motor vehicles, failure of Illinois seller of used automobile to note bank's lien on vehicle's certificate of title resulted in failure of bank's security interest to come into existence, thereby rendering inappropriate seller's references to Illinois Uniform Commercial Code in seller's action to replevy vehicle. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 375 N.E.2d 149 (4th Dist. 1978).

Transaction between contractor and surety for completion of public improvement project following contractor's default was not intended to have effect as security. *Aetna Cas. & Sur. Co. v. Perrotta*, 62 Misc. 2d 252 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

B. Mobile Goods.

14. Generally.

Industrial equipment may not be characterized as mobile goods within meaning of Code § 9-103(2). *In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969) (applying Pennsylvania law).

15. Incoming goods subject to security interest.

A security interest in a house trailer perfected in Virginia before the trailer was moved to Oklahoma was effective in the latter state under subsec. (3). *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

An assignee of a conditional sales agreement made in New York is protected as against a purchaser of the security in Pennsylvania for a period of four months provided that the security interest was perfected in New York before the security was brought into Pennsylvania. *Casterline v. GMAC*, 195 Pa. Super. 344, 171 A.2d 813 (1961).

16. Four month rule.

Where (1) five shipments of nylon yarn shipped from the Netherlands were deliv-

ered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien

creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Where (1) Pennsylvania seller sold boat to Pennsylvania buyer and delivered it to buyer in Maryland, (2) secured party, which had financed purchase of boat by conditional sales contract, perfected its security interest in boat by filing financing statement in Pennsylvania (3) buyer resold boat to third person in Maryland, (4) seller, as representative of secured party, thereafter came to Maryland, took possession of boat, and returned it to seller's premises in Pennsylvania, and (5) second buyer brought replevin action to recover possession of boat, court held (1) that under UCC § 9-103(3), secured party's security interest in boat, which had been perfected under Pennsylvania law, was also perfected for four months under Maryland law, (2) that after such four-month period had run, secured party's failure to file financing statement in Maryland caused its security interest to become unperfected, and (3) that under UCC § 9-301(1)(c), such unperfected interest was subordinate to rights of second buyer, who was buyer not in ordinary course of business who gave value and received delivery of the collateral without knowledge of security interest therein and before such interest was reperfected in Maryland. *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980 (1978).

The majority of courts which have considered the question have concluded that UCC § 9-103(4) does not apply to all security interests, but only to those which attach after the certificate of title is issued. It may be argued that the statute, as thus interpreted, permits a person in possession of personal property to defraud an innocent purchaser. But it must be kept in mind that the legislature, in adopting the Uniform Commercial Code, sought to strike a balance between the interests of the prior lienholder and those of a subsequent, good-faith purchaser or creditor. In order to afford some protection to the party with the prior interest, he is given, under UCC § 9-103(3), a period of four months in which to perfect his interest in

this state. After that, his priority is lost until he perfects the interest. If this protection is given, a prospective purchaser or creditor has the burden of making sure that the property has been located in this state for more than four months. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977).

One who takes title to incoming auto subject to security interest of assignee of conditional vendor during four months from time auto entered jurisdiction cannot prevail over assignee under UCC § 9-103(3). *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

17. —Priority.

Lien created in Massachusetts enjoyed superiority in New York for period of 4 months from date auto arrived in New York without any further measures being undertaken by conditional vendor's assignee, who sought to recover from New York purchaser, to localize such foreign security interest. *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

Where cattle here in question were transported from Utah to Wyoming within 4 months of their delivery to debtor, under Wyoming Code, creditor's security interest perfected under laws of Utah is superior to any rights of innocent purchasers. *Utah Farm Prod. Credit Ass'n v. Dinner*, 302 F. Supp. 897 (D. Colo. 1969) (applying Wyoming law).

18. —Lapse of perfection.

Where holder of security interest in automobile which was perfected under Texas law did not reperfect its security interest within four-month period after automobile was brought into Arizona, interests of persons who purchased automobile during that four-month period were not subject to such security interest. *Arrow Ford, Inc. v. Western Landscape Constr. Co.*, 23 Ariz. App. 281, 532 P.2d 553 (1975).

Goods having been removed directly to New Jersey, failure to file financing statement in that state clearly renders security interest unperfected at end of four months

even if court considered security interest to have been originally perfected in Pennsylvania; held, four months' period begins to run whether or not secured party has notice that collateral has been removed to another jurisdiction. *In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349 (3d Cir. Pa. 1969) (appling New York law).

19. —Particular examples.

Where (1) plaintiff Farmers Home Administration made loan to Mississippi farmer and properly perfected security interest in Mississippi in all of farmer's livestock, (2) farmer, without knowledge or approval of plaintiff, shipped livestock from Mississippi to Tennessee to be sold, (3) livestock, within four months of their removal to Tennessee, were sold to bona-fide purchasers by defendant livestock broker, (4) farmer did not apply sale proceeds to plaintiff's loan and defaulted on loan payments, and (5) plaintiff took no action to perfect its security interest in Tennessee, court held (1) that Uniform Commercial Code should be adopted as relevant federal common law in Farmers Home Administration security-interest cases; (2) that if there should be lack of uniformity on particular issue, either because of nonuniform changes in UCC itself or because of differing interpretations of a uniform provision, court would ordinarily follow weight of authority; (3) that in present case, since right of plaintiff to recover in conversion against defendant depended on which of two interpretations should be given to four-months protection rule in UCC § 9-103(3), court would adopt interpretation favored by weight of authority, which is that UCC § 9-103(3) gives secured party four months of "absolute protection" in removal state without necessity of any additional filing in removal state at any time; and (4) that since defendant had sold livestock within four months of their removal to Tennessee, judgment would be entered for plaintiff. *United States v. Burnette-Carter Co.*, 575 F.2d 587 (6th Cir. Tenn. 1978), *cert. denied*, 439 U.S. 996, 99 S. Ct. 596, 58 L. Ed. 2d 669 (1978).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2)

buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re

Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978) (applying South Carolina law).

Perfected purchase money security interest from foreign state is not enforceable in Florida unless perfected within four-month period; this is clear legislative intent under UCC § 9-103(3) despite apparent injustice to holder of purchase money security interest who fails to register lien in Florida after motor vehicle is moved thereto. *GECC v. Hollywood Bank & Trust Co.*, 263 So. 2d 593 (Fla. App. 1972).

The innocent purchaser in New Jersey of an automobile subject to a security interest perfected in New York takes the vehicle subject to the rights of an assignee of the original New York conditional vendor where the transaction in New Jersey took place within four months after the conditional vendee had removed the automobile to that state, even though the security interest had not then been perfected in New Jersey, for the four month period provided by subsec. (3) is an absolute period of protection of the vendor's security interest. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

A conditional vendor who fails to perfect his security interest within the four-month period provided by subsec. (3) is no longer protected, and a subsequent purchaser of the property for value and without notice of the security interest would take a superior title. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

20. Thirty day rule.

In bankruptcy proceeding involving conflicting interests in car purchased by debtor in Illinois prior to being declared bankrupt in Georgia, where (1) debtor created security interest in vehicle which holder duly perfected under Illinois statute that required such interest to be perfected by noting it on vehicle's certificate of title; (2) debtor at time of purchase informed secured party that debtor would remove vehicle to Georgia within 30 days for purposes other than transportation and debtor did remove it within such time, but secured party did not take any steps to perfect such security interest in Georgia; (3) debtor's trustee in bankruptcy claimed superior interest in vehicle under provi-

sion of Georgia certificate-of-title statute which declared that Georgia law would determine validity of out-of-state security interest in vehicle brought into Georgia if parties understood at time interest was created that vehicle would be kept in Georgia and vehicle was brought into Georgia within 30 days thereafter for purposes other than transportation; (4) secured party claimed superior interest in vehicle under another provision of the Georgia certificate-of-title statute which provided that security interest perfected under law of jurisdiction where vehicle was situated when interest attached would continue perfected in Georgia if name of holder of interest was shown on certificate of title issued by such other jurisdiction; and (5) secured party also contended that in light of Georgia version of UCC § 9-103(3), term "validity of security interest" in statutory provision on which bankruptcy trustee based claim to vehicle in suit was not synonymous with "perfection of security interest," so as to sustain trustee's claim, federal court would certify to Supreme Court of Georgia question whether holder of security interest in vehicle in suit was also required to obtain Georgia certificate of title for such vehicle and to note thereon its security interest in order to protect it against claim of bankruptcy trustee. In re McClintock, 558 F.2d 732 (5th Cir. Ga. 1977), appeal decided, 571 F.2d 317 (5th Cir. Ga. 1978) (certifying question of Georgia law determinative of cause to Supreme Court of Georgia).

21. Movement of property covered by certificate of title.

Where bankrupt, using money borrowed from New York bank, purchased second hand truck in Ohio and acquired clean certificate of title in Ohio, bank's security interest not being noted on title certificate as required by Ohio law, bankrupt registered vehicle in Ohio using title certificate, although bank knew nothing of Ohio registration and title certificate nor of bankrupt's intention to register vehicle there, and although truck was garaged principally in New York, in accordance with UCC § 9-103(4) law of Ohio determined existence of perfected security interest prior to bank's lawful repossession

of truck in state of New York and bank, therefore, did not obtain perfected security interest in New York by filing financing statement in New York. In re Osborn, 389 F. Supp. 1137 (N.D.N.Y. 1975) (applying New York law).

Under Virginia UCC, perfection of security interest would be governed by law of jurisdiction which issued certificate of title on mobile home, which in this case was West Virginia. In re Smith, 311 F. Supp. 900 (W.D. Va. 1970), aff'd, 437 F.2d 898 (4th Cir. Va. 1971).

UCC § 9-103(4) unequivocally removes application of UCC § 9-103(3) to any personal property covered by a certificate of title issued under a statute of any state which requires indication on a certificate of title of any security interest as a condition of perfection; in other words, one who has a security interest in personal property, perfected in a state which requires the issuance of a certificate of title on such property and the listing thereon of a security interest as a condition of perfection, does not have to protect such security interest by any further action in a state to which the property may thereafter be removed; this places an undue burden on prospective lienees in Alabama which does not have a registration and title statute; it appears the undue hardship to lenders in Alabama resulting from the effect of UCC § 9-103(4) was created by the legislature and must be removed by it, either by repeal, amendment, or passage of other correctional legislation. Deposit Nat'l Bank v. Chrysler Credit Corp., 48 Ala. App. 161, 263 So. 2d 139 (Civ. App. 1972).

UCC § 9-103(4) relating to perfection of security interests in other states is not repealed by motor vehicle code provision regarding certificate of title to auto, and controls where auto was purchased in Illinois and registered in Ohio, where mortgagee's security interest was noted on Ohio certificate of title, and where owner's judgment creditor knew of foreign registration and that there was some lien, so that mortgagee's security interest under UCC § 9-103(4) was superior to that of creditor. Town House Motel, Inc. v. Ward, 2 Ill. App. 3d 699, 276 N.E.2d 809 (5th Dist. 1971).

Once a security interest (lien) is noted upon a certificate of title in a state which requires such notation for perfection, security interest (lien) remains perfected when vehicle is removed to another state, even if debtor has not obtained new certificate of title in other state. *Streule v. Gulf Fin. Corp.*, 265 A.2d 298 (D.C. 1970).

Where a house trailer was purchased in Virginia and the certificate of title issued by that state showed a bank's conditional sales contract as a lien thereon, it was unnecessary for the security holder to perfect its lien in New York within four months after the trailer was moved there, for subsection (4), rather than subsection (3) was controlling. *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967).

22. —Title to nontitle state.

Where bank had perfected security interest in automobile in Oklahoma, driver of car fraudulently obtained Oklahoma certificate of title which indicated there were no liens on vehicle, drove car to Nevada and sold it to defendant on May 15, 1971, trial court erred in dismissing bank's complaint for conversion of car on grounds that bank failed to prove car had been brought into Nevada within four-month period immediately preceding date when driver sold car to defendant, as prescribed by UCC § 9-103(3); evidence showed that driver took possession of automobile in Oklahoma in December, 1970, that he made two payments on vehicle which were mailed from Oklahoma, and that he obtained Oklahoma certificate of title in March, 1971, from which it could be inferred that automobile was in Oklahoma as late as March, 1971, within four months of time when defendant purchased it. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Where Texas bank perfected security interest in automobile located in Texas, a title state, and gave owner permission to take car to New York, a nontitle state, and license it there, with understanding that it would not have to relinquish its Texas title, and where owner, after driving car to New York and obtaining clear New York title certificate, drove car to Washington, a title state, obtained clear Washington title and within four months after leaving

Texas sold car to Washington purchaser, Texas law governed initial perfection of security interest and, regardless of whether Texas bank perfected its security interest in compliance with Washington law, its security interest continued under UCC § 9-103(3) to be perfected in Washington for first four months after car was brought into state and, thus, upon owner's default, Texas bank could lawfully repossess car from Washington buyer. *Morris v. Seattle-First Nat'l Bank*, 10 Wash. App. 129, 516 P.2d 1055 (1973).

23. —Nontitle to title state.

Under UCC § 9-103, holder of security interest in automobile, perfected pursuant to laws of Minnesota, a nontitle state, who had no knowledge of its removal to Nebraska, a title state, had priority over Nebraska purchaser without knowledge of such security interest who purchased automobile with clear Nebraska title within 4 months of its arrival in Nebraska; UCC § 9-103, Official Comment 7, makes it clear that subsection (4) does not apply to automobile which was sold under conditional sales contract in state which does not require indication on certificate of title of any security interest in property as condition of perfection, and which was subsequently brought into state which had such requirement; thus, in present case, pursuant to UCC § 9-103(3), question of whether plaintiff had perfected security interest in automobile when it was brought to Nebraska was governed by Minnesota law. *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974), overruled on other grounds, *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981).

New Jersey UCC § 9-103(4) should only be applied to goods which, at the time of entry into New Jersey, are covered by a certificate of title. New Jersey UCC § 9-103(3) should apply to all goods which are moved into New Jersey from noncertificate-of-title jurisdictions. If a certificate of title is subsequently acquired, New Jersey UCC § 9-103(3) remains applicable according to its terms. And with respect to professional buyers of goods, the four-month grace period provided in New Jersey UCC § 9-103(3) is absolute, and bona-fide status is no pro-

tection. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978).

In action to foreclose chattel mortgage on mobile home that was assigned to plaintiff by party that financed purchase of such home in British Columbia, Canada, where (1) plaintiff's security interest in such home was perfected by filing under British Columbia law, which did not issue certificates of title to mobile homes; (2) purchasers breached chattel mortgage's provisions by taking home from British Columbia into state of Washington without consent of plaintiff chattel-mortgage holder and secured Washington certificate of title to such home by falsely representing that they owned it free of any lien or security interest therein; and (3) purchasers on basis of such certificate of title obtained loan from Washington lender and lender perfected security interest in home in accordance with Washington law, court would hold under UCC § 9-103(3) and (4), and also Washington statute dealing with perfection and loss of security interest where vehicle subject to interest had certificate of title, that as between the two holders of a perfected security interest in such home, holder of interest perfected in British Columbia had priority, since UCC § 9-103(4) does not apply to all security interests, but only to those that attached after certificate of title to vehicle was issued. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977) (citing annotation; also holding that the holder of security interest perfected in British Columbia must first exhaust its Canadian security before resorting to proceeds of sale, in state of Washington, of mobile home in suit).

Where security interest of secured party with respect to automobile was duly perfected in Arizona and Texas prior to time debtor brought automobile to Oklahoma and where Oklahoma certificate of title was prepared but not issued in Oklahoma, under UCC § 9-103(4), accomplished perfection in Arizona or Texas would continue in Oklahoma and security interest of secured party was superior to claim of subsequent creditor in Oklahoma. *McMillin v. Phoenix Telco Fed. Credit Union*, 429 F. Supp. 131 (W.D. Okla. 1976) (applying Oklahoma law).

Subsection (4) does not apply to an automobile which was sold under a conditional sales contract in a state that does not require indication on a certificate of title of any security interest as a condition of perfection, although the automobile was subsequently brought into a state which had such a requirement. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

Under subsection (3) of this section the New York assignee of a conditional sales contract who has filed the contract in accordance with the then existing Uniform Commercial Code had made its reservation of title valid against all persons under New York Law as that state did not require a notation of the seller's interest to appear on the title certificate, and at time the car buyer purported to sell it in Pennsylvania, the assignee held a perfected security interest in the car in that state. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

24. —Between title states.

Where (1) buyer purchased 1974 pickup truck on July 12, 1974, (2) secured party perfected security interest therein under New York law by obtaining certificate of title on which secured party's lien was noted, (3) buyer moved from New York to Oklahoma on June 13, 1975, and applied for and received Oklahoma certificate of title for such truck without surrendering New York certificate of title, which was still in secured party's possession in New York, (4) buyer was adjudicated bankrupt on October 18, 1976, and (5) secured party, as of date of buyer's adjudication of bankruptcy, had not filed any financing statement in Oklahoma reflecting its security interest in truck, court held that bankruptcy judge did not err in holding that notation of secured party's lien on New York certificate of title, which remained outstanding and unsurrendered on buyer's relocation to Oklahoma, was not sufficient to maintain secured party's perfected security interest in truck under UCC § 9-103(4). In such case, UCC § 9-103(3)-providing that previously perfected security interest in property subsequently brought into a second state continues perfected in second state for four months,

after which it must be reperfected in second state-applies, and since secured party had never filed financing statement concerning truck in Oklahoma, it had no perfected security interest in truck as of date on which debtor was adjudicated bankrupt. *In re Foster*, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

Where (1) Canadian creditor, which was assignee of buyer's automobile-purchase contract with Canadian dealer, perfected its lien on vehicle under Canadian law, (2) buyer acquired Canadian certificate of registration which did not require notation thereon of creditor's security interest, (3) buyer drove car to New Jersey, where he changed Canadian registration to New Jersey registration and fraudulently obtained "clean" New Jersey certificate of title which showed no liens on vehicle, (4) buyer within four days after purchasing vehicle sold it to New Jersey used-car dealer, which in turn sold it to one of its customers, and (5) Canadian creditor sued New Jersey dealer for conversion, court would hold, on reinstating trial court's granting of summary judgment for plaintiff, (1) that New Jersey UCC § 9-103(3) and (4) should be interpreted to protect interest of foreign lienholder, (2) that priority of plaintiff's perfected security interest under Canadian law was not defeated by original buyer's fraudulent securing of "clean" New Jersey certificate of title, and (3) that defendant dealer and professional buyer, which in good faith purchased vehicle with "clean" certificate of title, was not entitled to prevail over plaintiff which held valid but undisclosed foreign lien. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978) (noting that New Jersey had not adopted 1972 amendment of UCC § 9-103).

Auto subject to security interest perfected under Oklahoma law was brought

into Texas without knowledge or consent of owners or holder of security interest; Texas certificate of title was issued to plaintiff dealer's predecessor in interest; held, dealer took subject to outstanding security interest. *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App. 1970), *aff'd*, 465 S.W.2d 933, 42 A.L.R.3d 1158 (Tex. 1971) (superseded by statute as stated in *Rutherford v. Whataburger, Inc.* (CA 5th Dist) 601 SW2d 441).

Truck was not sold in ordinary course of business; buyer had no knowledge of Florida source of origin of truck; buyer inquired of seller and checked proper county offices in New York and found that no liens had been filed against truck; Florida bank held chattel mortgage on truck; bank had permitted seller, who had acquired title in Florida, to register title in New York; both New York and Florida are title states; seller had failed to use proceeds of sale to pay off lien; held, lien of bank was subordinated to buyer's purchase interest. *Seely v. First Bank & Trust*, 64 Misc. 2d 845 (1970).

25. —Between nontitle states.

Where finance company had perfected security interest in automobile in Oklahoma, a non-title state, car was registered in Alabama, also a non-title state, and then certificate of title was issued in Georgia, a certificate of title state, which showed no security interest, and vehicle was subsequently sold to purchaser in Alabama within four months after vehicle was removed from Oklahoma, finance company's security interest was in full force and effect in Alabama when purchaser bought car and, hence, finance company's claim was superior to that of purchaser. *GMAC v. Long-Lewis Hdwe. Co.*, 54 Ala. App. 188, 306 So. 2d 277 (Civ. App. 1974), *cert. denied*, 293 Ala. 752, 306 So. 2d 282 (1974).

SUBPART 3.

PRIORITY.

SEC.

- 75-9-317. Interests that take priority over or take free of security interest or agricultural lien.
- 75-9-318. No interest retained in right to payment that is sold; rights and title of

- seller of account or chattel paper with respect to creditors and purchasers.
- 75-9-319. Rights and title of consignee with respect to creditors and purchasers.
- 75-9-320. Buyer of goods.
- 75-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.
- 75-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.
- 75-9-323. Future advances.
- 75-9-324. Priority of purchase-money security interests.
- 75-9-324A. Priority of production-money security interests and agricultural liens.
- 75-9-325. Priority of security interests in transferred collateral.
- 75-9-326. Priority of security interests created by new debtor.
- 75-9-327. Priority of security interests in deposit account.
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- 75-9-330. Priority of purchaser of chattel paper or instrument.
- 75-9-331. Priority of rights of purchasers of instruments, documents, and securities under other articles; priority of interests in financial assets and security entitlements under Article 8.
- 75-9-332. Transfer of money; transfer of funds from deposit account.
- 75-9-333. Priority of certain liens arising by operation of law.
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- 75-9-336. Commingled goods.
- 75-9-337. Priority of security interests in goods covered by certificate of title.
- 75-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.
- 75-9-339. Priority subject to subordination.

§ 75-9-317. Interests that take priority over or take free of security interest or agricultural lien.

- (a) A security interest or agricultural lien is subordinate to the rights of:
 - (1) A person entitled to priority under Section 75-9-322; and
 - (2) Except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:
 - (A) The security interest or agricultural lien is perfected; or
 - (B) One (1) of the conditions specified in Section 75-9-203(b) (3) is met and a financing statement covering the collateral is filed.
- (b) Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.
- (c) Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.
- (d) A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment

property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Except as otherwise provided in Sections 75-9-320 and 75-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within twenty (20) days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

SOURCES: Former 1972 Code § 75-9-317 [Codes, 1942, § 41A:9-317; Laws, 1966, ch. 316, § 9-317, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-402 by Laws, 2001, ch. 495, § 1. Present § 75-9-317 was derived from 1972 Code § 75-2A-307 [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994] and former 1972 Code § 75-9-301 [Codes, 1942, § 41A:9-301; Laws, 1966, ch. 316, § 9-301; Laws, 1977, ch. 452, § 14; Laws, 1986, ch. 343, § 1; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Filing provisions and agricultural liens, see § 75-9-310.

Priorities among conflicting security interests in and agricultural liens on same collateral, see § 75-9-322.

Priority of security interests in fixtures and crops, see § 75-9-334.

Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Perfection of security interests in motor vehicles, see § 63-21-43.

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48. Decisions under Code 1942 § 5080-09.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-301.

A. Generally.

6. In general.

The provision in § 75-9-301(4) limiting the lien's priority to future advances made within 45 days of perfection of an intervening lien or without actual knowledge of the new lien does not directly reach real estate secured transactions, but does pronounce the public policy in an area on its face indistinguishable in principle from

real estate secured transactions. *Shutze v. Credithrift of Am., Inc.*, 607 So. 2d 55 (Miss. 1992).

After a security interest in collateral has been perfected by filing, any buyer not in the ordinary course of business takes subject to the security interest. However, if the security interest has not been perfected, even a buyer not in the ordinary course of business will have priority to the extent he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected (see UCC § 9-301(1)(c)). *Thorp Sales Corp. v. Dolese Bros. Co.*, 453 F. Supp. 196 (W.D. Okla. 1978).

Under UCC § 9-301(1)(c), an unperfected security interest is subordinate to the interest of an innocent buyer who has given value and received delivery of the secured collateral, provided that the buyer is not a buyer in the ordinary course of business. *McKenzie v. Oliver*, 571 S.W.2d 102 (Ky. Ct. App. 1978).

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agree-

ment were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Under UCC § 9-302(1)(d), a valid financing statement, properly filed, perfects a security interest in a motor vehicle. Until that time, under UCC § 9-301(1)(c), a buyer not in the ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the unperfected security interest, takes free of such interest. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Where (1) Pennsylvania seller sold boat to Pennsylvania buyer and delivered it to buyer in Maryland, (2) secured party, which had financed purchase of boat by conditional sales contract, perfected its security interest in boat by filing financing statement in Pennsylvania (3) buyer resold boat to third person in Maryland, (4) seller, as representative of secured party, thereafter came to Maryland, took possession of boat, and returned it to seller's premises in Pennsylvania, and (5) second buyer brought replevin action to recover possession of boat, court held (1) that under UCC § 9-103(3), secured party's security interest in boat, which had been perfected under Pennsylvania law, was also perfected for four months under Maryland law, (2) that after such four-month period had run, secured party's failure to file financing statement in Maryland caused its security interest to become unperfected, and (3) that under UCC § 9-301(1)(c), such unperfected interest was subordinate to rights of second buyer, who was buyer not in ordinary course of business who gave value and received delivery of the collateral without knowledge of security interest therein and before such interest was reperfected in Maryland. *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980 (1978).

When reference is made in UCC § 9-301 to "knowledge" it is "actual" knowledge. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

The instant section only pertains to "security interest." *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963).

7. Application.

This Section of the Code relates to secured transactions insofar as third persons are concerned and does not determine the effect of a secured transaction as between the original debtor and the original creditor. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

Issues arising between an assignee for the benefit of creditors and the owner of machinery allegedly leased to the debtor are not controlled by the Uniform Commercial Code, where the lease agreement had been signed prior to the effective date of the Code. *In re Merkel, Inc.*, 46 Misc. 2d 270 (1965).

8. Choice of law.

Contention of allegedly bona fide purchaser of caterpillar tractor, in which plaintiff creditor held unperfected security interest and also lien pursuant to filed writ of attachment, that priority sections of Article 9 of Utah Uniform Commercial Code (see UCC § 9-301 et seq.) should be applied to determine priority of interests in tractor, instead of provisions of Utah Fraudulent Conveyance Act, would not be sustained because adoption of Uniform Commercial Code by Utah legislature was not intended to supersede existing Utah Fraudulent Conveyance Act. *Meyer v. General Am. Corp.*, 569 P.2d 1094 (Utah 1977).

9. Knowledge of security interest as affecting priority.

In action involving seller's petition to reclaim furniture sold to insolvent buyer, where (1) seller sold furniture to buyer which buyer accepted, (2) at time of delivery, seller did not know that buyer was insolvent, (3) two days after learning of buyer's insolvency, seller sent telegram to buyer demanding rescission under UCC § 2-702 and, after receiver was appointed for buyer, filed petition to reclaim goods,

(4) bankruptcy court denied petition on ground that bankruptcy trustee was entitled to goods under § 70(c) of Bankruptcy Act and that UCC § 2-702 conflicted with §§ 64 and 67(c) of Bankruptcy Act, and (5) district court affirmed bankruptcy court's ruling, court held (1) that issue was whether seller could reclaim under UCC § 2-702(2) when seller's demand followed filing of bankruptcy petition, (2) that under § 70(c) of Bankruptcy Act, bankruptcy trustee acquired rights of hypothetical lien creditor, (3) that buyer was insolvent when it received goods from seller, (4) that seller had discovered such fact and made demand for reclamation within ten days after buyer received goods, as required by UCC § 2-702(2), (5) that state law controlled rights of bankruptcy trustee as hypothetical lien creditor, (6) that reference in UCC § 2-702(3) to rights of lien creditors directs that those rights be found exclusively in UCC Article 2 or in articles to which Article 2 refers, (7) that lien creditor was not "purchaser for value" under UCC § 2-403 and that bankruptcy trustee acquired no rights under UCC § 2-403 as against reclaiming seller, (8) that under facts of case, bankruptcy trustee also acquired no rights under UCC §§ 2-326 or 9-301, and no lien creditor could cut off seller's right to reclaim under UCC § 2-702(2), (9) that by same token, § 70(c) of Bankruptcy Act did not give trustee right to cut off seller's right to reclaim, (10) that UCC § 2-702(2) created something other than a security interest, (11) that UCC § 2-702(2) was not an unlawful priority that conflicted with § 64 of Bankruptcy Act, (12) that UCC § 2-702(2) was not lien subject to invalidation as statutory lien under § 67(c) of Bankruptcy Act, and (13) that reclamation under UCC § 2-702(2) in instant case did not constitute invalid preferential transfer under § 60 of Bankruptcy Act. *Matter of PFA Farmers Market Ass'n*, C.A.8 (Mo.)1978, 583 F.2d 992

One who becomes a lien creditor under the provisions of subsec. (3), and becomes such without knowledge of a security interest and before it is perfected, has priority over another with a prior but unperfected security interest. *Gray v. Raper*, 115 Ga. App. 600, 155 S.E.2d 670 (1967).

10. —Knowledge immaterial.

UCC § 9-104(j) provides that UCC Art 9 does not apply to creation or transfer of interest in real estate, including lease or rents thereunder. Thus, in action by assignee of right to receive royalties and rent payments arising from lease of rock quarry against judgment lien creditors of assignor of such right and garnishees in possession of such rents and royalties, rents and royalties in garnishees' possession were not subject to UCC Art 9, and judgment lien creditors were not prohibited by UCC § 9-301 from taking priority to such funds over assignee who had unperfected security interest in funds, even though judgment lien creditors had knowledge of assignee's security interest at time they became lien creditors. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 552 S.W.2d 392 (Tenn. Ct. App. 1976).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. *In re Pasco Sales Co.*, 77 Misc. 2d 724 (1974).

Purchaser of assets from receiver was entitled to step into receiver's shoes and claim interest superior to that of consignor which held unperfected security interest, notwithstanding that purchaser knew of consignor's claim when it purchased assets. *Columbia Int'l Corp. v. Kempler*, 46 Wis. 2d 550, 175 N.W.2d 465, 40 A.L.R.3d 1066 (1970).

As a secured party is not a lien creditor it is immaterial that he has knowledge of the existence of a prior unperfected security interest and where such latter secured party's interest is perfected he prevails over the prior unperfected security interest. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

11. —Lien creditor over judgment creditor with knowledge.

Assignee of conditional sales contract covering road grader was entitled to priority over judgment creditor which admit-

ted having knowledge of assignee's claim to grader at time of its levy. *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

12. —Unperfected security interest over judgment or lien creditor with knowledge.

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971, with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

Where judgment creditor admitted knowledge of bank's claim to road grader at time judgment creditor levied, judgment creditor did not have priority over bank's unperfected security interest under UCC § 9-301(1)(b). *Central Nat'l Bank v. Wonderland Realty Corp.*, 38 Mich. App. 76, 195 N.W.2d 768 (1972).

Defendant purchased apartment house and furniture with full knowledge of plaintiff's security interest; held, defendant took subject to plaintiff's title under conditional sales contracts. *Kimmel v. Keefe*, 9 Cal. App. 3d 402 (1st Dist. 1970).

Fact that lien creditor had "notice" of existing security interest in equipment through its agent was sufficient to subordinate its lien to unperfected security interest, as against contention that there was insufficient "knowledge" for such subordination. *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969).

B. Receivers in Equity and Assignees For Benefit of Creditors.

13. In general.

Receivers in equity of an insolvent's estate had the status of a lien creditor from the time of their appointment, under subsection (3) of this section. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

14. Assignee over unperfected security interest.

Under the terms of the above statute an unrecorded conditional sale is an unperfected security interest which is subordinate to the rights of an assignee for the benefit of creditors. *In re Merkel, Inc.*, 45 Misc. 2d 753 (1965), rev'd on other grounds, sub nom. *In re Merkel, Inc.*, 25 A.D.2d 764, 269 N.Y.S.2d 190 (2d Dep't 1966).

A reclaimant who had not filed a financing statement with the secretary of the commonwealth until after an assignment for benefit of creditors had been executed by the bankrupt had not complied with the statutory requirements in Pennsylvania to perfect her security interest, and the rights of the assignee for benefit of creditors would ordinarily be superior to hers. *In re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

15. Miscellaneous.

A lease that reveals that it possesses none of the vital characteristics, such as a right or obligation on the part of the lessee to acquire title, which transmuted it from a lease into a conditional bill of sale, enables the lessor to recover the leased property from the lessee's assignee for benefit of creditors. *In re Merkel, Inc.*, 46 Misc. 2d 270 (1965).

C. Lien Creditors.

16. In general.

Lien-creditor status under UCC § 9-301(1)(b) gives such creditor priority over subsequently perfected security interest. *Yarbrough v. Cooper*, 559 S.W.2d 917 (Tex. Civ. App. Houston 14th Dist. 1977), ref. n.r.e (Apr. 19, 1978).

17. Lien creditor and secured party distinguished.

The Uniform Commercial Code makes an express distinction between a "secured

creditor" (see UCC § 9-105(1)(m)) and a "lienholder." Under UCC § 9-301(3), a "lien creditor" is a creditor who has acquired a lien on the property involved by attachment, levy, or the like. *Kramer v. McDonald's Sys.*, 61 Ill. App. 3d 947, 378 N.E.2d 522 (1st Dist. 1978), *aff'd*, 77 Ill. 2d 323, 33 Ill. Dec. 115, 396 N.E.2d 504 (1979).

Although secured party had perfected security interest in after-acquired property of debtor, there is nothing in UCC § 9-301(3) which includes party with such status within definition of "lien creditor," thus, there was nothing to prevent unpaid seller from reclaiming goods sold to debtor-buyer, despite claim of secured party that it was lien creditor entitled to priority under UCC § 2-702(3). *Chastain-Roberts Co. v. Better Brands, Inc.*, 141 Ga. App. 186, 233 S.E.2d 5 (1977).

18. Lien creditor over unperfected security interest.

Where (1) purchaser of truck, who was in default on loan made by first secured creditor, borrowed money from second secured creditor to pay off first creditor's loan, (2) first creditor's lien on truck was then discharged of record, (3) second creditor, although it obtained note and security agreement covering truck, which instruments were executed on behalf of corporation of which debtor was officer, neglected (a) to effect transfer of truck's title to debtor's corporation, (b) to perfect security interest in truck by recording its lien on vehicle's title document, and (c) to record such title document with Director of Motor Vehicles, (4) debtor's corporation became insolvent, and receiver was appointed therefor, and (5) truck was sold at judicial sale, and receiver claimed that his interest in sale proceeds had priority over second secured creditor's lien on truck, court held (1) that under UCC § 9-301(1)(b) and (3), providing that unperfected security interest is subordinate to rights of one who becomes "lien creditor" without knowledge of such security interest and before it is perfected, receiver of debtor's corporation had apparent priority as a "lien creditor" because second creditor's unperfected lien on truck would yield to receiver's priority as "lien creditor" who had no knowledge of second

creditor's lien, in absence of any evidence that creditors represented by receiver had any such knowledge themselves, (2) that despite receiver's apparent priority, the Uniform Commercial Code, under UCC § 1-103, is supplemented by principles of law and equity unless such principles are displaced by any provision of the code, (3) that no particular provision of UCC Article 9 had displaced the doctrine of equitable subrogation where such doctrine was properly invocable as a matter of substantive law, and (4) that under all circumstances of case, second creditor's contention that it was entitled to be subrogated to first creditor's recorded lien before such lien was discharged, on the ground that second creditor's money was used to pay off such prior lien, should be sustained. *Kaplan v. Walker*, 164 N.J. Super. 130, 395 A.2d 897 (App. Div. 1978).

In interpleader proceeding to establish priority of claims to money due and payable to debtor under general agency contract, UCC § 9-104 exemption from coverage of article 9 of claims for wages, salary, or other compensation of employee was inapplicable where debtor was independent contractor; creditor who had obtained perfected security interest in debtor's commissions had first priority against funds, while rights of creditor who had failed to perfect its security interest as required by UCC § 9-302 were subordinated to rights of those who qualified as lien creditors under UCC § 9-301; burden of proof as to whether lien creditors had knowledge of unperfected security interest rested on holder of unperfected security interest. *Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank*, 372 F. Supp. 1027 (E.D. Pa. 1974), *aff'd sub nom.* *In re Franklin Nat'l Bank*, 510 F.2d 969 (3d Cir. Pa. 1975), *aff'd*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Mercantile Financial Corp.*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Miller*, 510 F.2d 970 (3d Cir. Pa. 1975), *aff'd sub nom.* *In re Mokrin*, 510 F.2d 970 (3d Cir. Pa. 1975).

Under the statute, a person, who becomes a lien creditor of the conditional vendee without knowledge of the conditional vendor's security interest and prior to the perfection of that security interest,

would take priority over the conditional vendor with respect to interest in the subject property. *L.B. Smith, Inc. v. Foley*, 341 F. Supp. 810 (W.D.N.Y. 1972).

In Oklahoma, under UCC § 9-301(1)(b) an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. *In re McClain*, 447 F.2d 241 (10th Cir. Okla. 1971), cert. denied, 405 U.S. 918, 92 S. Ct. 943, 30 L. Ed. 2d 788 (1972).

19. —Assignment of accounts, contract rights.

In suit to determine priority as between mechanic's lien on "Payloador" machine and assignee's unperfected security interest in machine, where (1) machine was purchased by lessor who immediately sold it to lessee under lease-purchase agreement intended as security instrument and not as mere lease; (2) lessor in good faith filed financing statement in improper county before assigning financing paper to plaintiff; (3) machine was later repaired by mechanic who had mechanic's lien for such repairs; and (4) lienholder at time of acquiring lien was not aware of lessor's security interest in machine, lienholder's lien under UCC § 9-301(1)(b) had priority over plaintiff's unperfected security interest. *ITT Indus. Credit Co. v. Robinson*, 350 So. 2d 48 (Miss. 1977).

Factoring company, to whom an attorney assigned fees to be received from a certain client, which failed to perfect its security interest by filing a financing statement was subordinated to the rights of another lawyer who, with no knowledge of the prior assignment, became entitled to receive the fees by reason of an agreement with the assigning attorney. *In re Cohen's Estate*, 38 Pa. D. & C.2d 777 (1966).

Since the absolute assignment by a partner to his co-partner of the right to collect from the state highway department the partner's share of money due for work done by the partnership on a completed highway construction project was not an assignment of a contract right but was an assignment of an account, the assignment was not a security transaction and, consequently, a subsequent attachment by the

partner's judgment creditor of money due on the highway project did not create a lien having priority over the prior assignment. *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963).

20. —Lease intended as security interest.

A lease-purchase agreement covering an air compressing machine which provided that 85 percent of the rental was to be applied on the specified price of the machinery was a security interest created by contract and, being unrecorded, it did not protect the lessor from a lien creditor of the lessee. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

21. —Other transactions intended as security interest.

Where document evidencing transaction involving walk-in food freezer as titled "Contract of Sale and Agreement," parties termed themselves buyer and seller and expressed desire to consummate sale of freezer, monthly payments of "rent" were in reality interest on deferred purchase price, transaction was conditional sale, rather than lease, and contract created security interest in seller; and since seller never filed financing statement to perfect his security interest, perfected security interest of Small Business Administration in buyer's equipment and fixtures had priority. *Witmer v. Kleppe*, 469 F.2d 1245 (4th Cir. W. Va. 1972).

22. Place of filing.

Where financing statements filed with secretary of state alone and not filed locally did not protect security interest, lien creditor had priority over holder of security interests. *Package Mach. Co. v. Cosden Oil & Chem. Co.*, 51 A.D.2d 771 (2d Dep't 1976).

23. —Timely filing.

Holder of security interest in debtor's accounts receivable, customer obligations or other choses in action was subordinated with respect to chose in action to garnishing creditor whose lien was created before security interest was perfected, but was superior after perfection to claim of all other creditors who intervened in proceed-

ings. *General Lithographing Co. v. Sight & Sound Projectors, Inc.*, 128 Ga. App. 304, 196 S.E.2d 479 (1973).

24. Judgment lien creditor over unperfected security interest.

Where ranch owners sold ranch, including equipment and cows, to buyers and executed security agreement for balance of purchase price, but no financing statement was filed as provided by UCC § 9-302, where buyers purchased cattle feed from feed seller, but failed to pay for feed, where subsequently buyers voluntarily relinquished possession of ranch, cows and equipment to owners, and where feed seller sued buyers for unpaid feed bill, obtained stipulated judgment and levied execution on cows, under UCC § 9-301(1)(b), feed seller, a lien creditor, had priority over unperfected security interest of owners. *Kulik v. Albers, Inc.*, 91 Nev. 134, 532 P.2d 603 (1975).

Judgment creditor was entitled to priority over assignee of debtor's expected recovery of pending lawsuit, where assignee failed to perfect security interest by filing. *Friedman, Lobe & Block v. C.L.W. Corp.*, 9 Wash. App. 319, 512 P.2d 769 (1973).

Lien obtained through attachment execution on partnership interest, after defendant had allegedly assigned interest to his attorney as collateral for fees and costs, took priority over rights of attorney-assignee; partnership interest came within definition of "general intangible" under UCC § 9-106, security interest therein was clearly within scope of security interests governed by article 9 of code under UCC § 9-102, and, inasmuch as no financing statement was filed under UCC § 9-302, such security interest was unperfected and plaintiff's lien, obtained through attachment execution, took priority under UCC § 9-301 over rights of defendant's attorney as holder of unperfected security interest of which plaintiff had no knowledge. *Med-Mar, Inc. v. Dilworth*, 96 Montg. County L. Rep. 91 (Pa. 1972).

Failure to perfect security interest necessarily subordinated unperfected security interest to creditor holding judicial lien without knowledge of security interest. *Mann v. Clark Oil & Ref. Corp.*, 302 F.

Supp. 1376 (E.D. Mo. 1969), aff'd, 425 F.2d 736 (8th Cir. Mo. 1970).

D. Secured Interests.

25. In general.

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Under UCC § 9-302(1)(d), a valid financing statement, properly filed, perfects a security interest in a motor vehicle. Until that time, under UCC § 9-301(1)(c), a buyer not in the ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the unperfected se-

curity interest, takes free of such interest. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Where (1) Pennsylvania seller sold boat to Pennsylvania buyer and delivered it to buyer in Maryland, (2) secured party, which had financed purchase of boat by conditional sales contract, perfected its security interest in boat by filing financing statement in Pennsylvania (3) buyer resold boat to third person in Maryland, (4) seller, as representative of secured party, thereafter came to Maryland, took possession of boat, and returned it to seller's premises in Pennsylvania, and (5) second buyer brought replevin action to recover possession of boat, court held (1) that under UCC § 9-103(3), secured party's security interest in boat, which had been perfected under Pennsylvania law, was also perfected for four months under Maryland law, (2) that after such four-month period had run, secured party's failure to file financing statement in Maryland caused its security interest to become unperfected, and (3) that under UCC § 9-301(1)(c), such unperfected interest was subordinate to rights of second buyer, who was buyer not in ordinary course of business who gave value and received delivery of the collateral without knowledge of security interest therein and before such interest was reperfected in Maryland. *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980 (1978).

The rights of a holder of a perfected security interest are superior to this of a lien creditor, and are also superior to those of a third party purchaser at a sheriff's sale. *GMAC v. Stotsky*, 60 Misc. 2d 451 (1969).

A buyer who purchases an almost new automobile not in the ordinary course of business cannot, under this section, take against the holder of a perfected security interest, and the seller's delivery of the car under these circumstances was a conversion as against the holder of the security interest. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

26. Perfected security interest over lien creditor.

Term "advances" are sums put at disposal of borrower, and do not include ex-

penditures made by lender for his own benefit; § 75-9-301 is intended to protect lien creditors by giving them special priority only against security interests securing certain sorts of future advances, and general rules as to non-advance obligations are not upset. *Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc.*, 746 F.2d 126 (2d Cir. Conn. 1984).

Application for certificate of title to house trailer, signed by buyer, describing security interest, and containing description of trailer, was sufficient to create security agreement within meaning of UCC § 9-203 and filing of application for certificate of title with the Secretary of State as provided by the state vehicle code constituted perfection of security interest; thus, pursuant to UCC § 9-301(1), seller's security interest was superior to subsequently attaching landlord's lien. *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 350 N.E.2d 356 (5th Dist. 1976).

Where secured party's security interest in collateral was perfected at time of assignment and account debtor's assignee had notice of assignment, secured party's rights were protected by continuation statement unilaterally filed by secured party within time limits prescribed by Code, so that secured party's claim to collateral was superior to that of assignee as lien creditor. *In re Marta Coop.*, 74 Misc. 2d 612 (1973).

Secured creditor who has duly filed financing statement covering after-acquired collateral is entitled to priority over subsequent lien creditors seeking to levy on same property. *Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir. Ind. 1969), cert. denied, 396 U.S. 827, 90 S. Ct. 75, 24 L. Ed. 2d 78 (1969), but see, *In re Coppie*, 728 F.2d 951 (7th Cir. Ind. 1984), but see, *Redmond v. Mendenhall*, 107 B.R. 318 (D. Kan. 1989).

A buyer who purchases an almost new automobile not in the ordinary course of business cannot, under this section, take against the holder of a perfected security interest, and the seller's delivery of the car under these circumstances was a conversion as against the holder of the security interest. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

27. —Assignments.

Where owner of stock in corporation formed to sell eggs, after selling such stock under contract providing that buyers would make payments on instalment plan, assigned right to sale proceeds to third party as security for loan that third party made to owner; where third party then perfected its security interest by appropriate filing; and where purported statutory lien of owner's divorced wife on such stock, which was based on execution on alimony judgment, had lapsed as to owner's general personalty and never did exist as to owner's stock because no levy was ever made on stock specifically, under UCC § 9-301(1)(b) third party's right to proceeds of stock's sale was superior to alleged right thereto of divorced wife. *Ralston Purina Co. v. Detwiler*, 173 Ind. App. 513, 364 N.E.2d 180 (1977).

Proper filing of financing statement under UCC § 9-405(1) which disclosed on face assignment of security interest in ice cream store equipment fixed status of assignee as secured party of record with priority of interest over that of lien creditor under UCC § 9-301 who, after judgment for unpaid rent, attached property and requested sale thereof with full knowledge of assignee's claim to equipment. *Marco Fin. Co. v. Solbert Indus., Inc.*, 534 S.W.2d 469 (Mo. Ct. App. 1975).

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

28. Perfected security interests over unperfected.

Failure of creditor with perfected purchase money security interest to renew original filing relegated creditor to standing of unperfected secured creditor; creditor did not reperfect its purchase money lien upon repossession of collateral, due to

20-day perfection requirement. *United States v. Williams*, 82 B.R. 430 (Bankr. N.D. Miss. 1988).

Trustee of bankrupt buyer of mobile trailer in issue, who under federal bankruptcy law had rights of lien creditor with respect to bankrupt's assets as of date of filing of bankruptcy petition, could not successfully contend that his equitable right to compel seller of trailer to convey title thereto to trustee had priority, under UCC § 9-301(1)(b), over bank's security interest in trailer where bank's security interest was perfected prior to date on which bankruptcy petition was filed. *Mann v. Belle Bland Bank*, 451 F. Supp. 268 (E.D. Mo. 1978), *aff'd*, 592 F.2d 993 (8th Cir. Mo. 1979).

Where chattel mortgage on trailer was defective under UCC § 9-402(1) as filed financing statement because it lacked both address of secured party and debtor's mailing address, chattel mortgagee's security interest was unperfected under § 9-302(1), and under UCC § 9-301(1)(b), judgment lien creditor, which had obtained judgment against chattel mortgagor, executed on such judgment, and seized trailer in suit, had priority to proceeds from trailer's sale. *Cushman Sales & Serv. of Neb., Inc. v. Muirhead*, 201 Neb. 495, 268 N.W.2d 440 (1978).

In action by lender to establish security interest in mobile homes "floor-planned" for dealer, (1) where lender pursuant to written agreement advanced money to dealer in Arizona for inventory financing, agreement gave lender security interest in all of dealer's present and after-acquired inventory, and lender filed financing statement with Arizona secretary of state; (2) where Alabama manufacturer thereafter orally sold 16 mobile homes to dealer but was not paid therefor, invoice accompanying such homes stated that title thereto could be transferred only through manufacturer's certificate of origin, and manufacturer retained all such certificates; (3) where manufacturer did not file financing statement evidencing its interest in such homes with Arizona secretary of state; and (4) where Arizona motor-vehicle registration code, at time of sale of homes to dealer, exempted them from registration requirement while they were still owned

by dealer or manufacturer, plaintiff lender (1) was not required to file financing statement and certificates of title to homes with Arizona motor-vehicle division in order that lender's lien could be indorsed on such certificates and lender's security interest in dealer's inventory could be perfected; (2) lender's security interest in homes was perfected merely by filing financing statement with Arizona secretary of state pursuant to UCC § 9-302(1) and UCC § 9-401; (3) manufacturer, by retaining title to homes, merely reserved unperfected purchase-money security interest therein under UCC § 2-401; and (4) lender's perfected security interest in homes had priority over manufacturer's unperfected security interest therein under UCC § 9-301. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

When seller failed to perfect security interest in goods in question, as he might very well very easily have done, his security interest or lien becomes subordinate to lien validly attaching to property. *Harney v. Spellman*, 113 Ill. App. 2d 463, 251 N.E.2d 265 (4th Dist. 1969).

As a secured party is not a lien creditor it is immaterial that he has knowledge of the existence of a prior unperfected security interest and where such latter secured party's interest is perfected he prevails over the prior unperfected security interest. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

29. —Place of filing.

Where creditor of New York lessor of heavy equipment, installed in New Jersey by New Jersey lessee, perfected security interest in equipment leases by New York filing but not perfect its interest in reversion in New Jersey where equipment was located, lessor's trustee in bankruptcy had priority with respect to equipment itself over creditor's unperfected security interest. *In re Leasing Consultants, Inc.*, 351 F. Supp. 1390 (E.D.N.Y. 1972), remanded, 486 F.2d 367 (2d Cir. N.Y. 1973).

Where creditor of New York lessor of heavy equipment, installed in New Jersey by New Jersey lessee, perfected security interest in equipment leases by New York filing but not perfect its interest in reversion in New Jersey where equipment was located, lessor's trustee in bankruptcy had

priority with respect to equipment itself over creditor's unperfected security interest. *In re Leasing Consultants, Inc.*, 351 F. Supp. 1390 (E.D.N.Y. 1972), remanded, 486 F.2d 367 (2d Cir. N.Y. 1973).

30. —Timely perfection.

In action to determine priorities of assignments made by owner of condemned land to proceeds of condemnation award, (1) under UCC § 9-301(1)(a) and § 9-312(5)(a), assignee which had first perfected its security interest by filing financing statement with secretary of state had first priority in such proceeds, (2) assignee which had perfected its security interest by filing after date on which holder of first priority had filed had second priority, (3) assignee which had never filed financing statement had third priority, and (4) all of such priorities were subordinate to lien of attorney for owner of the condemned land, even though attorney's notice of intent to enforce his attorney's lien was not filed in record of action until after both perfected creditors had filed their financing statements, since under circumstances of case, such creditors had duty to inquire about status of attorney's lien. *Board of County Comm'rs v. Berkeley Village*, 40 Colo. App. 431, 580 P.2d 1251 (1978).

In action between creditors for possession of debtors' (husband and wife) collateral, where (1) (a) plaintiff creditor's security agreement, which did not provide for future advances, covered debtors' household furnishings, (b) plaintiff properly filed financing statement on December 20, 1973, (c) debt was fully paid on November 8, 1974, and (d) plaintiff did not file termination statement, (2) defendant creditor's security agreement covered essentially the same property, and defendant properly filed financing statement on January 3, 1975, (3) (a) plaintiff creditor, on July 11, 1975, December 1, 1975, and July 2, 1976, made new loans to debtors, (b) debtors executed new security agreements covering same collateral first pledged in 1973, and (c) plaintiff relied on December 20, 1973 financing statement, (4) debtors filed petition in bankruptcy on September 23, 1976, and (5) defendant creditor, on September 30, 1976, seized property covered by both plaintiff's and

defendant's perfected security interests, court held (1) that all loans made by plaintiff and defendant, except plaintiff's July 2, 1976 loan, were governed by pre-1972 UCC § 9-312(5)(a), which determined priority between conflicting security interests in same collateral by order of filing if both were perfected by filing, (2) under pre-1972 UCC § 9-312(5)(a), plaintiff's security interest in collateral for plaintiff's July 11, 1975 and December 1, 1975 loans, which was perfected at time such loans were made, had priority over defendant's security interest in the same collateral because plaintiff was the first to file, (3) such priority was not affected by fact that plaintiff's original loan, which was covered by plaintiff's filed financing statement of December 20, 1973, had been paid off, since under pre-1972 UCC § 9-403(2), a financing statement specifying no maturity date was effective for five years from date of its filing, and debtors had not requested that they be sent a termination statement, (4) under UCC § 9-312(7), which was added to Uniform Commercial Code in 1972, plaintiff's July 2, 1976 advance had same priority as plaintiff's December 1, 1975 advance, thus giving plaintiff's July 2, 1976 loan priority over defendant's loan, (5) since only one of the debtors-the wife-had properly signed plaintiff's December 20, 1973 financing statement, plaintiff's security interest had priority over defendant's security interest only to extent of wife's interest in the collateral, and (6) conversely, defendant's security interest in property of husband, and also in property of wife that was not listed in plaintiff's December 20, 1973 financing statement, had priority over plaintiff's security interest under pre-1972 UCC § 9-301(1)(a) and § 9-312(5)(a). *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 245 S.E.2d 510 (1978), cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

Under UCC § 9-301, security interest of cattle seller was subordinate to rights of garnishing lien creditor where debtor purchased cattle from seller and paid for them with check which was subsequently dishonored for insufficient funds, where debtor shipped cattle to livestock auction company for resale and writ of garnish-

ment was served on auction company, where seller and debtor subsequently executed security agreement and financing statement, back-dated, and properly describing cattle in question and where financing statement was filed within ten days after debtor purchased cattle from seller. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), ref. n.r.e. (Apr. 7, 1976).

In action involving determination of priority between lien resulting from attachment in California of trousers produced in foreign countries and consigned to purchaser in North Carolina, and bank's security interest resulting from financing agreements executed and filed in North Carolina, any right of bank was subordinate to attachment lien, where, pursuant to UCC § 9-102, the "situs" rule for choice of law applied, and where, under California law, bank had not perfected its security interest at time trousers were sited in California and were attached. *Joint Holdings & Trading Co. v. First Union Nat'l Bank*, 50 Cal. App. 3d 159 (2d Dist. 1975).

A debtor who fails to file a financing statement with the Secretary of State and the town clerk, giving notice of existence of a conditional sales contract, has not perfected his security interest, and his rights are subordinate to those of another subsequent creditor who timely filed financing statements giving notice of existence of a chattel mortgage covering the same personal property and fixtures. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

31. Perfected security interest over judgment creditor.

Creditor which had perfected security interest in most of debtor's assets on April 3, 1972 by filing proper financing statements, and which subsequently perfected such security interest in all of debtor's assets on January 28, 1975, by taking possession thereof, had under UCC § 9-301(1) and UCC § 9-312 right to assets superior to right of second creditor which did not acquire interest in assets until April 11, 1975, when it levied execution on judgment against debtor and became lien creditor under UCC § 9-301(3). Thus, on

debtor's default, first creditor could sell such assets under UCC § 9-504(1) and retain all proceeds of sale when proceeds did not fully satisfy debt owed to such creditor. *GE Co. v. Hol-Gar Mfg. Corp.*, 431 F. Supp. 881 (E.D. Pa. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. Pa. 1978).

Since security interests perfected by proper filing take priority over all unfiled and unperfected interests (Uniform Commercial Code, § 9-301) and liens of judgment creditors are perfected only by the issuance of an execution pursuant to CPLR 5202 (subd [a]), the lien of plaintiff judgment creditor levied upon against defendant debtor corporation's bank accounts in June, 1977 was subsequent and subordinate to the security interest filed and perfected in October, 1975 by defendant's bank under an accounts receivable agreement by which defendant assigned its accounts receivable to the bank as security for indebtedness and upon defendant's default the bank was entitled under such agreement and section 151 of the Debtor and Creditor Law to apply the funds in defendant's cash collateral, general and payroll accounts to defendant's debt without regard to plaintiff's levy against them. *Cibro Petro. Prods. Inc. v. Fowler Finishing Co.*, 92 Misc. 2d 450 (1977).

Security interest of bank in debtor's cash collateral account, which was perfected by proper filing on October 20, 1975, had priority under UCC § 9-301(1)(b) over lien of creditor who obtained judgment against debtor and had execution issue on judgment on June 2, 1977 against debtor's cash collateral account with bank, since under state law, lien of judgment creditor could not be perfected until issuance of execution on judgment. *Cibro Petro. Prods. Inc. v. Fowler Finishing Co.*, 92 Misc. 2d 450 (1977).

Fully perfected security interest in account receivable was superior to lien of subsequent judgment creditor who levied on such account prior to default on part of debtor in secured transaction, notwithstanding fact that at time of levy there was no default on bank loan to which security agreement related; rights of parties were fixed, not when levy was made,

but rather when security interest attached. *Shaw Mudge & Co. v. Sher-Mart Mfg. Co.*, 132 N.J. Super. 517, 334 A.2d 357 (App. Div. 1975).

In garnishment action, garnishee was entitled to discharge upon proof of prior valid assignment by judgment debtor, and was not required to prove that unfiled security interest of assignee took priority over subsequent judgment lien. *Liberty Leasing Co. v. Crown Ice Mach. Leasing Co.*, 19 Ill. App. 3d 27, 311 N.E.2d 250 (1st Dist. 1974).

Held, inasmuch as properly filed financing statement charged judgment-creditor with notice of outstanding security interest, garnishee-bank was entitled to priority over lien held by judgment creditor, under UCC § 9-301(1)(b). *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 455 F.2d 141 (4th Cir. Md. 1970).

Once purchase money security agreement is entered into and financing statement evidencing that agreement is filed in accordance with requirements of Code, then secured party acting in good faith acquires rights which are superior to subsequent judgment creditors and third party purchasers. *GMAC v. Stotsky*, 60 Misc. 2d 451 (1969).

Log seller who had taken judgment and garnishment against log buyer was "lien creditor" within Code § 9-301(3), and as such had claim subordinate to previously perfected security interest under Code § 9-301(1)(b). *Stumbo v. Paul B. Hult Lumber Co.*, 251 Or. 20, 444 P.2d 564 (1968).

Where petitioner's security interest was perfected by proper filing, it thereupon took priority over all unfiled and unperfected interests, including the rights of judgment creditors who thereafter issued execution, since under Rule 5202(a) CPLR such creditors are perfected only by the issuance of execution; and, upon default in payments due on the indebtedness secured by the interest, petitioner became entitled to immediate possession of the collateral under the provisions of § 9-503. *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821 (1967).

32. Unperfected security interests as between parties.

Lack of perfection of security interest under Article 9 of UCC relates only to

priority over other creditors' interests in collateral, and security agreement as between parties themselves and secured party's rights over collateral as against debtor are unaffected by failure to perfect security interest; thus, assignee for security purposes of beneficial interest in land trust was entitled to redeem from tax sale of real estate which comprised corpus of trust notwithstanding his failure to perfect security interest by filing financing statement. Application of County Treasurer of Du Page County, 16 Ill. App. 3d 385, 306 N.E.2d 743 (2d Dist. 1973).

As between the parties, the fact that the creditor's interest is not noted on the title certificate is immaterial since as between the creditor and the debtor the creditor's security interest attaches immediately upon the execution of a written agreement that there be such an interest, which agreement describes the collateral, bears the debtor's signature, and does not include any provision expressly postponing the attaching of the security interest. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968).

Although failure to file and record notice of insurance salesman's partial assignment of future commissions might affect the priorities of creditors, it would have no bearing on the validity of the instrument as between the immediate parties thereto under the Arkansas version of this and succeeding sections. *Union Life Ins. Co. v. Perkins*, 257 F. Supp. 154 (E.D. Ark. 1966).

33. Unperfected security interests over other transactions.

Transferee of furniture store inventory was transferee in bulk under UCC § 6-102, rather than buyer in ordinary course of business under UCC § 9-307(1), and, having failed to request transferor to furnish list of creditors as required by UCC § 6-104(1), was subordinate to rights of secured party who had prior unperfected security interest in inventory where furniture transferred clearly represented entire inventory of transferor, where transferor was retail furniture store whose principal business was sale of merchandise from stock, and where transfer was not in ordinary course of transferor's business; although transferor was retail outlet

owned by furniture wholesaler, for purposes of determining whether sale was major part of inventory of enterprise within meaning of UCC § 6-102(1), only retail outlet would be considered since transferee's dealings with transferor concerned only retail outlet and its inventory, and retail outlet was, at all times, considered separate entity. *National Bank v. Frydlewicz*, 67 Mich. App. 417, 241 N.W.2d 471 (1976).

Where buyer paid for used automobiles with check which was dishonored after buyer executed "trust receipts" agreement which specified that bank would hold security interest in automobiles as collateral for loan, bank had unperfected security interest in automobiles which was superior to seller's right to reclaim cars, seller's remedy being an action against buyer for price of delivered goods under Code § 2-709. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 32 Colo. App. 235, 511 P.2d 912 (1973), *aff'd*, 184 Colo. 166, 519 P.2d 354 (1974).

34. Unperfected security interests over tax lien.

Security interest need not be perfected under UCC in order to be protected against subsequent judgment lien under Section 6323(h)(1) of Federal Tax Lien Act and thus creditor's security interest in debtor's popcorn crop was not primed by federal tax lien merely because creditor failed to file financing statement in county where debtor resided as required by UCC § 9-401(1)(a). However, creditor's security interest was not protected under Federal Tax Lien Act and did not prime government's tax lien, even if property was in custodia legis before government's tax lien was filed, where it was possible for hypothetical creditor to obtain judgment lien against property purportedly in custodia legis without obtaining knowledge of secured party's security interest; hypothetical creditor could attach judgment lien to property in custodia legis by obtaining in personam judgment against debtor in another court and delivering writ of execution based on that judgment to sheriff at which time lien would attach to debtor's property and creditor would become "lien creditor" under UCC § 9-301(3) without creditor learning of action pending in

court holding property. *Dragstrem v. Obermeyer*, 549 F.2d 20 (7th Cir. Ind. 1977).

E. Tax Liens.

35. In general.

United States was within "lien creditor" definition of UCC § 9-301 where it had filed its tax lien and had what was in effect a judgment at the time it made its tax assessment. *L.B. Smith, Inc. v. Foley*, 341 F. Supp. 810 (W.D.N.Y. 1972).

36. Tax lien creditor over unperfected security interest.

Contractor's assignment of right to payment to its surety pursuant to indemnity agreement was account or contract right within meaning of UCC § 9-106 and was, as such, security interest subject to provisions of Article 9 of UCC; however, UCC §§ 9-301 and 9-302 provide that, with respect to such security interests in accounts and contract rights, any lien creditor, including judgment lien creditor, will have priority over secured interest unless financing statement has been filed; since no such financing statement was filed by surety with respect to assignment in question, its security interest remained subordinate to tax liens of United States. *American Fid. Fire Ins. Co. v. United States*, 385 F. Supp. 1075 (N.D. Cal. 1974).

37. Tax lien creditors versus judgment creditors; timeliness.

Where (1) plaintiffs obtained judgment against debtor on December 10, 1974 and delivered writ of execution on judgment to county sheriff on December 12, 1974, (2) Internal Revenue Service, on January 15, 1975, filed with county recorder of deeds notice of lien on all of debtor's property pursuant to October 7, 1974 assessment for unpaid taxes, (3) bank paid balance in debtor's account to United States pursuant to notice of levy served by Internal Revenue Service, and (4) plaintiffs obtained citation from county circuit court to discover debtor's assets on January 23, 1975 and, on finding bank account depleted, requested Internal Revenue Service to return money on ground that it had been wrongfully seized, plaintiffs acquired lien on debtor's intangible personal property (bank account) on delivery of writ of

execution to sheriff, were lien creditors within meaning of UCC § 9-301(3), and their lien had priority under first-in-time, first-in-right rule of federal statute (26 USCA § 6323) over tax lien filed by Internal Revenue Service. *Asher v. United States*, 570 F.2d 682 (7th Cir. Ill. 1978).

Where plaintiffs did not become judgment lien creditors, within meaning of phrase "lien creditor" contained in UCC § 9-301(3), until April 3, 1975, when they obtained judgment against defendant corporation for unpaid debt, and where United States properly filed lien against defendant corporation on March 13, 1975 for unpaid federal withholding taxes under assessment made on February 17, 1975, United States had priority to proceeds of sheriff's sale of defendant's personal property which were held by receiver of county in which defendant was located, since the federal tax lien was filed before plaintiffs obtained their judgment against defendant and under 26 USCA § 6323, plaintiffs were required to become judgment lien creditors, within meaning of UCC § 9-301(3), before filing of such tax lien in order to have priority. *Harrison v. Harold Cox Concrete Constr. Co.*, 440 F. Supp. 859 (W.D. Ky. 1977).

38. Tax lien creditors versus perfected security interest; place of filing.

Security interest need not be perfected under UCC in order to be protected against subsequent judgment lien under Section 6323(h)(1) of Federal Tax Lien Act and thus creditor's security interest in debtor's popcorn crop was not primed by federal tax lien merely because creditor failed to file financing statement in county where debtor resided as required by UCC § 9-401(1)(a). However, creditor's security interest was not protected under Federal Tax Lien Act and did not prime government's tax lien, even if property was in custodia legis before government's tax lien was filed, where it was possible for hypothetical creditor to obtain judgment lien against property purportedly in custodia legis without obtaining knowledge of secured party's security interest; hypothetical creditor could attach judgment lien to property in custodia legis by obtaining in personam judgment against debtor in an-

other court and delivering writ of execution based on that judgment to sheriff at which time lien would attach to debtor's property and creditor would become "lien creditor" under UCC § 9-301(3) without creditor learning of action pending in court holding property. *Dragstrem v. Obermeyer*, 549 F.2d 20 (7th Cir. Ind. 1977).

Secured creditor's lien was not entitled to priority over federal tax lien where financing statement was filed with county recorder instead of secretary of state as required by UCC § 9-401; although government had actual knowledge of security interest sufficient to give plaintiff priority under UCC § 9-301, federal test to determine existence of security interest was not met. *Fred Kraus & Sons v. United States*, 369 F. Supp. 1089 (N.D. Ind. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. Ind. 1974).

Federal tax lien filed on April 14 had priority over security interest filed locally on April 13, but not filed centrally with Secretary of State until April 15. *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973).

F. Trustee in Bankruptcy.

39. In general.

Since, under Pennsylvania law, the seller's right of rescission is not an absolute right but is subject to the right of a lien creditor who extended credit subsequent to the sale, and by virtue of § 70(c) of the Bankruptcy Act, the trustee in bankruptcy has rights of lien creditor, the trustee in bankruptcy has superior rights to the proceeds from the sale of seller's goods, even if the sale of goods on credit has been induced by positive misrepresentation by the bankrupts, and the seller had attempted to rescind the sale. *In re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

40. Trustee in bankruptcy over perfected security interest; timely filing.

Since bankruptcy petition was filed before perfection of lien, trustee's rights in collateral are superior to rights of lienholder. *In re Russell*, 300 F. Supp. 6 (E.D. Tenn. 1969).

The security interests of the seller of equipment for a butcher business and a

retail grocery store were subordinate to that of the buyers' trustee in bankruptcy where the seller did not file copies of the contracts in the office of the Secretary of the Commonwealth until after the buyers were adjudicated bankrupt, although copies were filed in the office of the prothonotary of the county wherein the buyers conducted their business. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

41. —Perfected security interest over trustee in bankruptcy.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of

Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-101(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 455 F. Supp. 926 (S.D.N.Y. 1978).

Trustee in bankruptcy of meat packer, as hypothetical lien creditor under UCC § 9-301(a)(2), (c), had interest superior to unperfected interest of cash sellers of cattle, but interest of trustee was subordinate to perfected security interest of meat packer's finance agency. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Secured party has valid, perfected security interest where execution of new note renewing old indebtedness was not creation of new obligation; therefore, secured party takes priority over trustee in bankruptcy. In re Cantrill Constr. Co., 418 F.2d 705 (6th Cir. Ky. 1969), cert. denied, 397 U.S. 990, 90 S. Ct. 1124, 25 L. Ed. 2d 398 (1970).

42. Trustee in bankruptcy over unperfected security interest.

Where (1) purchaser of truck, who was in default on loan made by first secured creditor, borrowed money from second secured creditor to pay off first creditor's loan, (2) first creditor's lien on truck was then discharged of record, (3) second creditor, although it obtained note and security agreement covering truck, which instruments were executed on behalf of corporation of which debtor was officer, neglected (a) to effect transfer of truck's title to debtor's corporation, (b) to perfect security interest in truck by recording its lien on vehicle's title document, and (c) to record such title document with Director

of Motor Vehicles, (4) debtor's corporation became insolvent, and receiver was appointed therefor, and (5) truck was sold at judicial sale, and receiver claimed that his interest in sale proceeds had priority over second secured creditor's lien on truck, court held (1) that under UCC § 9-301(1)(b) and (3), providing that unperfected security interest is subordinate to rights of one who becomes "lien creditor" without knowledge of such security interest and before it is perfected, receiver of debtor's corporation had apparent priority as a "lien creditor" because second creditor's unperfected lien on truck would yield to receiver's priority as "lien creditor" who had no knowledge of second creditor's lien, in absence of any evidence that creditors represented by receiver had any such knowledge themselves, (2) that despite receiver's apparent priority, the Uniform Commercial Code, under UCC § 1-103, is supplemented by principles of law and equity unless such principles are displaced by any provision of the code, (3) that no particular provision of UCC Article 9 had displaced the doctrine of equitable subrogation where such doctrine was properly invocable as a matter of substantive law, and (4) that under all circumstances of case, second creditor's contention that it was entitled to be subrogated to first creditor's recorded lien before such lien was discharged, on the ground that second creditor's money was used to pay off such prior lien, should be sustained. *Kaplan v. Walker*, 164 N.J. Super. 130, 395 A.2d 897 (App. Div. 1978).

Trustee in bankruptcy of meat packer, as hypothetical lien creditor under UCC § 9-301(a)(2), (c), had interest superior to unperfected interest of cash sellers of cattle, but interest of trustee was subordinate to perfected security interest of meat packer's finance agency. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Secured party's failure to file financing statement in accordance with Article 9 of Code rendered its security interest in lathe subordinate to that of trustee in bankruptcy. *First Bank & Trust Co. v. Post*, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1st Dist. 1973).

Historical society's unperfected security interest in station used by debtor railroad was not enforceable against creditor with perfected security interest arising out of recorded mortgage, nor against debtor's trustee in bankruptcy who had status of lien creditor. *In re New Hope & I.R.R.*, 353 F. Supp. 608 (E.D. Pa. 1973).

A trustee in bankruptcy becomes a "lien creditor" from the date of the filing of the petition, and an unperfected security interest in property of the bankrupt is subordinate to the rights of the trustee. *In re Ferro Contracting Co.*, 256 F. Supp. 89 (D.N.J. 1966), rev'd on other grounds, 380 F.2d 116 (3d Cir. N.J. 1967), cert. denied, 389 U.S. 974, 88 S. Ct. 475, 19 L. Ed. 2d 466 (1967).

The trustee in bankruptcy is a lien creditor whose rights are superior to those of an unperfected security interest holder. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

A trustee in bankruptcy claiming under the bankrupt's assignee for benefit of creditors would have an interest superior to a reclaimant's, if the reclaimant's security interests were not perfected. *In re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

A trustee in bankruptcy takes priority over an unperfected security interest in the property of the bankrupt. *In re Smith*, 205 F. Supp. 27 (E.D. Pa. 1962).

The debtor's trustee in bankruptcy prevails over the reclamation petition of a secured creditor where the secured creditor failed to perfect his interest by a proper filing. *In re Leiby*, 54 Berks C.L.J. 114 (Pa 1962).

Under subsection (1)(b) of the instant section, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected, and a trustee in bankruptcy is such a lien creditor from the time of the filing of the petition in bankruptcy, even though he personally has knowledge of the security interest, unless all the creditors represented by him have such knowledge. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

43. —Assignment of accounts and contract rights.

Where a manufacturer of components of military equipment, under subcontracts with primary manufacturers, borrowed money from a bank on assignments of its right to all moneys due and to become due under the subcontracts from the primary contractors, and subsequently the subcontractor was adjudicated a bankrupt, after which the subcontractor's trustee in bankruptcy sold its tools and dies to the primary contractors, the trustee did not assume the bankrupt's contracts even though the contracts had required the bankrupt to sell its tools and dies to the primary contractors after the completion of the contracts; hence, since the sales of the tools and dies to the primary contractors were not assumptions of the contracts by the trustee in bankruptcy, the funds received by the trustee in payment for the tools and dies were not payments under the contracts which passed to the bank under its assignment, but were sales of property on which the bank had neglected to perfect a lien, under this article, and to which the bankrupt's trustee was entitled as part of the bankrupt's estate. *In re Luscombe Engineering Co.*, 163 F. Supp. 706 (E.D. Pa. 1958), aff'd, 268 F.2d 683 (3d Cir. Pa. 1959).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid against a lien creditor, including a trustee in bankruptcy from the date of the filing of the petition; hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

44. —Knowledge of security interest by all creditors.

Trustee in bankruptcy is not held to have knowledge of assignment under

UCC § 9-301(3) where not all the creditors had actual knowledge thereof. *City of Vermillion v. Stan Houston Equip. Co.*, 341 F. Supp. 707 (D.S.D. 1972).

A trustee in bankruptcy has the status of a lien creditor without knowledge of a prior unperfected security interest unless all the creditors whom he represents have knowledge of the security interest, without regard to whether the trustee has actual knowledge. In *re Dennis Mitchell Indus., Inc.*, 280 F. Supp. 433 (E.D. Pa. 1968), rev'd on other grounds, 419 F.2d 349 (3d Cir. Pa. 1969).

Unless all creditors whom trustee in bankruptcy represents have knowledge of security interest, trustee is lien creditor without knowledge within Code § 9-301(3) even though he personally has knowledge of security interest; but one taking under such trustee as purchaser at bankruptcy sale will not prevail over unperfected security interest as would trustee under Code § 9-301(1)(b), if purchaser himself has actual knowledge of security interest. In *re Dennis Mitchell Indus., Inc.*, 280 F. Supp. 433 (E.D. Pa. 1968), rev'd on other grounds, 419 F.2d 349 (3d Cir. Pa. 1969).

If all creditors represented by debtor's assignee for the benefit of creditors had knowledge of the contents of an inadequately filed financing statement at the time the assignment was made, reclaimant holding the security interest would have a claim superior to that of the assignee and the debtor's trustee in bankruptcy, but actual knowledge on the part of the creditors is a question of fact on which reclaimant would have the burden of proof before the referee. In *re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

If the right of a security creditor is not perfected the effect of knowledge of the trustee in bankruptcy of the debtor is governed by UCC § 9-301 which provides that "Unless all the creditors represented had knowledge of the security interest [the trustee] is a lien creditor without knowledge even though he personally has knowledge of the security interest." In *re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

45. —6 month rule.

Where (1) creditor held perfected security interest in debtor's collateral for advances made to debtor, (2) where as of date debtor filed petition in bankruptcy, debtor had fully repaid creditor for all such advances, (3) where creditor did not file any claim as an unsecured creditor in debtor's bankruptcy proceeding until over a year after such proceeding had been commenced, and (4) where more than a year after debtor filed petition in bankruptcy, creditor claimed that although its advances to debtor had all been repaid, creditor's perfected security interest still existed under UCC § 9-301(1)(b) against collateral, which by then was in possession of bankruptcy trustee, to secure performance of certain secondary liabilities covered by security agreement with debtor, court would hold (1) that debtor's payment, prior to bankruptcy, of main indebtedness secured by collateral terminated creditor's perfected security interest in collateral, and (2) that as a result, creditor was merely an unsecured creditor that was barred from recovery because of its failure to file a claim in bankruptcy proceeding within 6-months period prescribed by bankruptcy statutes. In *re Apollo Travel, Inc.*, C.A.8 (Minn.)1977, 567 F.2d 841.

UCC § 9-403(3) requires filing of continuation statement within six months' period prior to expiration of five-year period during which original financing statement is effective; thus, where bank filed continuation statement almost two years prior to prescribed period, filing was premature and did not extend effective date of original financing statement beyond its expiration date. Facts that bank filed continuation statement pursuant to express language of UCC & 9-403(1) and that secretary of state accepted continuation statement without hesitation and without advising secured party that if statement was deemed premature, it would have no effect and would be destroyed along with original financing statement upon its expiration date, did not render it effective to support bank's petition for reclamation in bankruptcy proceeding. In *re Callahan Motors, Inc.*, 396 F. Supp. 785 (D.N.J. 1975), rev'd, 538 F.2d 76 (3rd Cir. N.J.

1976), cert. denied, 429 U.S. 987, 97 S. Ct. 507, 50 L. Ed. 2d 598 (1976).

G. Decisions Under Former Statutes.

46. Decisions under Code 1942 § 337.

Section [Code 1942, § 337] does not apply to the case where property subject to a purchase-money lien is acquired at an execution sale by one who had no knowledge of the lien's existence. *Motor Parts & Bearing Co. v. O.K. Rubber Welders, Inc.*, 251 Miss. 326, 169 So. 2d 444 (1964).

A lien under this section ceases to exist when the personal property subject to it is purchased at execution sale by one who has no knowledge of the existence of the lien. *Motor Parts & Bearing Co. v. O.K. Rubber Welders, Inc.*, 251 Miss. 326, 169 So. 2d 444 (1964).

An auctioneer who, in the regular course of his business, receives cattle from a cattle buyer and sells them for him on commission, and pays over the proceeds thereof, without notice, actual or constructive, of the seller's lien, is not liable to the seller as for a conversion, although the cattle buyer acts fraudulently in the matter. *Dixie Stock Yard, Inc. v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941).

Where a stockyard company, while not having acquired title to cattle purchased by a dealer and placed in its yards, had possession of them as bailee, factor or auctioneer, at a time when a purchase money lien could have been enforced against them, and then aided in the sale and disposition of the cattle to third persons against whom the lien could not be enforced, receiving a commission from the proceeds of the sale and diverting the remainder thereof to other purposes than a discharge of the lien, the company, if it had notice of the lien, would be liable in an appropriate action for the value of the cattle. *Dixie Stock Yard, Inc. v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941).

The lien given by this statute is good as against the purchaser's trustee in bankruptcy. *Commercial Credit Co. v. Davidson*, 112 F.2d 54 (5th Cir. 1940).

The lien expires when the property passes to a trustee in bankruptcy exercising the rights and remedies of a judgment creditor. *In re Monticello Veneer Co.*, 2 F. Supp. 27 (S.D. Miss. 1933).

Fans coming into hands of buyer's receiver remained subject to purchase-money lien. *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co.*, 166 Miss. 253, 140 So. 736 (1932).

Vendor's lien on lumber sold is lost when lumber passes to bona fide purchaser from vendee without notice of lien. *Tabb v. People's Bank & Trust Co.*, 160 Miss. 22, 133 So. 137 (1931).

Assignee for benefit of creditors in charge of assignor's goods, who has made inventory and notified all creditors of his appointment and to file claims, may hold possession of the goods against a lien for the purchase-price. *Goodbar & Co. v. Knight*, 89 Miss. 124, 42 So. 539 (1907).

Where property has been taken under a writ of seizure a voluntary surrender of such property by defendant to a third person having no valid prior right thereto, subsequent to the levy of the writ and to the execution of a forthcoming bond, cannot defeat the lien of the plaintiff in the writ nor release the surety from its obligation for the forthcoming of the property. *Fidelity & Deposit Co. v. B.F. Sturtevant Co.*, 86 Miss. 509, 38 So. 783, 109 Am. St. R. 716 (1905).

47. Decisions under Code 1942 § 5080-08.

Where an automobile dealer and a finance company choose to do business under the method provided by the Uniform Trust Receipts Act, the finance company cannot assert that it has a purchase money lien under Code 1942, § 337 which is prior to any lien created by the levy of execution by a judgment creditor. *Murdock Acceptance Corp. v. Woodham*, 208 So. 2d 56 (Miss. 1968).

48. Decisions under Code 1942 § 5080-09.

Where a trustee-dealer sold a large tractor at retail in the ordinary course of business and the purchaser executed a conditional sales contract, regular on its face, which was purchased for value and in good faith by a finance company, title to the tractor under the provisions of this section [Code 1942, § 5080-09] became vested in the finance company. *McDill v. City of Moss Point*, 208 So. 2d 757 (Miss. 1968).

A finance company which purchased for value and in good faith a conditional sales contract, representing the purchase price of a floor-planned tractor which the trustee-dealer had sold in the ordinary course of business, became vested with title to the tractor, entitled to prevail as a third party claimant in a replevin action brought against the purchaser by the entruster which held a trust receipt on the machine. *McDill v. City of Moss Point*, 208 So. 2d 757 (Miss. 1968).

Where a lien creditor of the trustee secured the issuance of process which resulted in the attachment of a levy on floor-planned automobiles on the day before the entruster filed his financing statements for record, the entruster's security interest was void as against the lien creditor. *Murdock Acceptance Corp. v. Woodham*, 208 So. 2d 56 (Miss. 1968).

A purchaser at execution sale for a grossly inadequate price does not acquire good title as against a trustor whose trust receipt has not been filed. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

The trust receipts act proceeds on the theory that the entruster is entitled to protection only against honest insolvency

of the trustee, and dishonest action of the trustee is a credit risk and bona fide purchasers are to be protected against the entruster who has taken that risk by entrusting. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

Where a trustee who had purchased autos on a floor planning agreement, and had traded an auto with a dealer and where the only instrument as to the floor planning agreement was a trust receipt financial statement which was recorded and which provided that the entruster expected to finance the trustee, a buyer who purchased the automobile from the dealer had not constructive notice of the arrangement and took the automobile free from any security interest. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

Where a trust agreement permitted the trustee to sell an automobile in the ordinary course of retail sale the word retail is to be counterdistinguished from bulk sales, which, as to requirement of notice to creditors of the seller, was provided for under the bulk sales law. *Commercial Credit Corp. v. General Contract Corp.*, 223 Miss. 774, 79 So. 2d 257 (1955).

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute respecting sale, assignment or transfer of retail installment contracts. 10 A.L.R.2d 447.

Coverage of "nonrecording" or "nonfiling" insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument. 51 A.L.R.2d 325.

Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer. 53 A.L.R.2d 936.

Priority as between mechanic's lien and purchase-money mortgage. 73 A.L.R.2d 1407.

Priority as between seller or conditional seller of personalty and claimant under after-acquired property clause of mortgage or other instrument. 86 A.L.R.2d 1152.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 98 et seq.

6 Am. Jur. 2d, Attachment and Garnishment §§ 495 et seq.

9 Am. Jur. 2d, Bankruptcy §§ 624, 688, 689, 692, 704.

13 Am. Jur. 2d, Carriers §§ 369-370.

68A Am. Jur. 2d, Secured Transactions §§ 780-791.

78 Am. Jur. 2d, Warehouses §§ 49 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:341-9:346 (priorities of security interests; over unperfected interests).

CJS. 6A C.J.S., Assignments §§ 79, 80, 85.

7 C.J.S., Attachment §§ 206, 219.

8A C.J.S., Bankruptcy § 263.

13 C.J.S., Carriers §§ 398-401.

79 C.J.S., Secured Transactions §§ 88 et seq.

38 C.J.S., Garnishment §§ 202-204.

72 C.J.S., Pledges § 23.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

The lien expires when the property passes to a trustee in bankruptcy exercising the rights and remedies of a judgment creditor. In re Monticello Veneer Co., 2 F. Supp. 27 (S.D. Miss. 1933).

§ 75-9-318. No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.

SOURCES: Former 1972 Code § 75-9-318 [Codes, 1942, § 41A:9-318; Laws, 1966, ch. 316, § 9-318; Laws, 1977, ch. 452, § 23, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-404 through 75-9-406 by Laws, 2001, ch. 495, § 1. Present § 75-9-318 was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-319. Rights and title of consignee with respect to creditors and purchasers.

(a) Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected security interest held by the consignor would have priority over the rights of the creditor.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-320. Buyer of goods.

(a) Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Except as otherwise provided in subsection (e), a buyer of goods from a person who used or bought the goods for use primarily for personal, family,

or household purposes takes free of a security interest, even if perfected, if the buyer buys:

- (1) Without knowledge of the security interest;
 - (2) For value;
 - (3) Primarily for the buyer's personal, family, or household purposes;
- and
- (4) Before the filing of a financing statement covering the goods.

(c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b), the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by Section 75-9-316(a) and (b).

(d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Subsections (a) and (b) do not affect a security interest in goods in the possession of the secured party under Section 75-9-313.

(f) Notwithstanding subsection (a), a secured party may not enforce a security interest in farm products against a buyer, commission merchant or selling agent who purchases or sells farm products in the ordinary course of business from or for a person engaged in farming operations unless the secured party has complied with the regulations issued by the Secretary of state under subsection (g) or unless the buyer, commission merchant or selling agent has received from the secured party or seller written notice of the security interest which complies with the requirements of Section 1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended.

(g) The Secretary of State shall issue regulations implementing a central filing system relating to farm products which conforms with the requirements of Section 1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended. The Secretary of State is authorized to set reasonable fees to defray the costs of the central filing system established pursuant to this section. At least thirty (30) days prior to the promulgation of such regulations or any amendments thereto, the Secretary of State shall give notice of such regulations and/or amendments to all licensed attorneys in the State of Mississippi.

SOURCES: Derived from former 1972 Code § 75-9-307 [Codes, 1942, § 41A:9-307; Laws, 1966, ch. 316, § 9-307; Laws, 1977, ch. 452, § 19; Laws, 1986, ch. 482, § 1, eff from and after December 24, 1986 (the date Section 1324 of the Food Security Act of 1985 became effective)] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Rights and title acquired by purchaser of goods, see § 75-2-403.

Document of title as conferring no rights against person having prior legal interest in absence of delivery of goods or document with power of disposition under this Code, see § 75-7-503(a).

Federal Aspects — Provisions of Section 1324 of the Food Security Act of 1985, see 7 USCS § 1631.

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- 33. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-307.

A. In General.

6. Generally.

UCC § 9-307(2) gives protection to the buyer of consumer goods against a perfected security interest under specified circumstances. The statute is limited in its application to transactions between a consumer seller and a consumer buyer, and the goods must be consumer goods in the hands of both buyer and seller. However, a buyer does not take free of a security interest under UCC § 9-307(2) where, prior to the purchase, a financing statement has been filed with respect to the security interest. *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245 (Miss. 1978).

UCC § 9-307 was generally designed to insure compliance by retailer under agreement with his inventory financier not to sell goods without financier's permission. If retailer sells goods without financier's permission, financier's recourse remains against noncomplying retailer and not buyer. *Adams v. City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977).

7. Authorized sales distinguished.

Judgment for plaintiff affirmed in replevin action brought by boat owner against prior owner and against bank claiming security interest in boat arising in connection with original sale; held, bank and original buyer had waived their UCC protection by authorizing boat dealer on their behalf to sell plaintiff the boat in issue. *Pieper v. First Nat'l Bank*, 453 S.W.2d 926 (Mo. 1970).

Code § 9-307(1) is inapplicable to sale of secured chattel which is authorized by secured party. *Draper v. Minneapolis-Moline, Inc.*, 100 Ill. App. 2d 324, 241 N.E.2d 342 (3d Dist. 1968).

B. Type of Collateral.

8. In general.

Where bank which had security interest in crops grown on farm authorized sale of

corn crop, lien was lost; and buyer who made final payment for corn by check payable only to owner of farm had no obligation or liability to bank. *Farmers Nat'l Bank v. Ceres Land Co.*, 32 Colo. App. 290, 512 P.2d 1174 (1973).

9. Inventory.

Perfected security interest in cattle feed did not, in and by itself, extend under UCC § 9-315(1) and UCC § 9-307(1) to cattle which ate such feed since feed, after being eaten, not only lost its identity under UCC § 9-315(1), but also ceased to exist within meaning of UCC § 9-315(1) and UCC § 9-307(1). Moreover, cattle which ate feed did not constitute "proceeds" thereof within meaning of UCC § 9-306(1) and (2). *First Nat'l Bank v. Bostron*, 39 Colo. App. 107, 564 P.2d 964 (1977).

Under UCC § 9-307(1) where buyer purchased new automobile from inventory of dealer in ordinary course of business, buyer took free of security interest held by bank under floor-planning arrangement, even though perfected and buyer knew of terms of security agreement. *F & M Bank & Trust v. Ksenych*, 252 N.W.2d 220 (S.D. 1977).

Auto purchase made from auto dealer's inventory in ordinary course of business without notice of trust security agreement between dealer and bank; held, buyer acquired title free of bank's trust security lien. *Correria v. Orlando Bank & Trust Co.*, 235 So. 2d 20 (Fla. App. 1970).

Buyer of "inventory" auto in ordinary course of business took free of security interest of car dealer's chattel mortgagee, even though financing statement outlining chattel mortgage had been duly recorded. *Franklin Inv. Co. v. Homburg*, 252 A.2d 95 (D.C. 1969).

Where security agreement gave lender security interest in manufacturer's inventory of veneer and all finished plywood, whenever acquired, and manufacturer delivered inventory to supplier, accepting plywood on payment, latter delivery was not sale in ordinary course of business and as such could not under Code § 9-307(1) extinguish lender's security interest in plywood. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

10. —Held for sale.

In action by buyer of airplane for declaratory relief concerning right to plane, where evidence showed (1) that plane was bought by plaintiff in ordinary course of business from defendant aircraft dealer, (2) that seller had entered into security agreement with defendant finance company, which loaned money to seller on security of seller's inventory, (3) that under such security agreement, seller had express power to sell inventory, including plane sold to plaintiff, (4) that secured party's lien was to apply to proceeds of any aircraft sales by seller, (5) that if seller should default by failing to hold such proceeds in trust for secured party, secured party would have rights and remedies available under Pennsylvania Uniform Commercial Code, (6) that secured party recorded security agreement with F.A.A. Aircraft Registry before plane was sold to plaintiff, (7) that seller failed to hold proceeds of sale of plaintiff's plane in trust for secured party, and (8) that on discovering such default, secured party notified plaintiff that secured party was asserting lien on plane superior to title of plaintiff, court held (1) that since security agreement was delivered in Pennsylvania, although federal recording of such agreement established that plaintiff had had notice of creditor's security interest in plane, Pennsylvania law determined validity of creditor's lien as against plaintiff, (2) that under Pennsylvania UCC § 9-307(1), a purchaser in the ordinary course of business, such as plaintiff in present action, prevails against creditor of seller, even if creditor's security agreement should not contain an express power of sale (which it did contain in present case), (3) that terms of creditor's security agreement with seller of plane should be given effect, and (4) that under those terms, creditor's lien was transferred from plane to proceeds of plane's sale, which seller did not remit to creditor, and plaintiff buyer took title to plane free and clear of creditor's lien under its security agreement. *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3d Cir. Pa. 1978).

Where Georgia Motor Vehicle Certificate of Title Act expressly provided that it did not apply to or effect security interest

in vehicle that was created by manufacturer or dealer who held vehicle for sale, and that buyer in ordinary course of trade from manufacturer or dealer would take vehicle free of such security interest, perfection of security interest in dealer's floor-planned vehicle would come under Georgia Uniform Commercial Code and priority as to such security interest would be governed by Georgia UCC § 9-307(1), which provides that buyer in ordinary course of business takes free of security interest created by his seller, even though such security interest is perfected and buyer knows of its existence. *Rome Bank & Trust Co. v. Bradshaw*, 143 Ga. App. 152, 237 S.E.2d 612 (1977).

In action by manufacturer of mobile home against dealer and purchaser of unit arising when dealer failed to pay manufacturer purchase price, mobile home fell within definition of "goods" under UCC § 2-105 and purchaser was entitled to protection from manufacturer's claim under UCC § 9-307(a) where purchaser, who took title from merchant entrusted with goods under UCC §§ 2-401 and 2-403, qualified as buyer in ordinary course of business under UCC § 1-201(9), notwithstanding purchaser's failure to request certificate of title of purchase. *Apeco Corp. v. Bishop Mobile Homes, Inc.*, 506 S.W.2d 711 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 12, 1974).

11. —Dealer in goods of that kind.

A buyer takes free of a security interest in goods created by a seller who is in the business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201, subd 9; § 9-307, subd 1), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549, 411 N.Y.S.2d 851 (1978).

Where defendant pawnshop purchased television sets from debtor who was not in business of selling television sets, and later resold them, defendant pawnshop was liable to secured party with purchase money security interest, despite fact that security interest was never recorded. *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658 (Tex. Civ. App. 1972).

12. Farm products.

Following acquiescence in, and sale of, the collateral, the farm-products lender stands on the same footing as the inventory financier. Under UCC § 9-306(2) and UCC § 9-307(1), neither has a continuing security interest in the collateral. However, each retains a threshold of protection because his security interest attaches to the proceeds of the sale. *Weisbart & Co. v. First Nat'l Bank*, 568 F.2d 391 (5th Cir. Tex. 1978).

Buyer of soybeans cannot claim "buyer in ordinary course of business" protection under UCC § 9-307(1) where soybean seller was a person engaged in farming operations. *United States v. Hughes*, 340 F. Supp. 539 (N.D. Miss. 1972).

Where debtor was engaged in business of buying cattle, feeding and fattening them, and selling them for slaughter, debtor was engaged in "farming operations" and cattle were "farm products," so that sale to buyer in ordinary course of business would not cut off secured party's security interest in debtor's livestock. *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

Code allows security interest in farm products to follow collateral through succession of purchases; and although after slaughtering cattle sold by debtor to slaughtering company were no longer "farm products" but "inventory," purchaser from slaughtering company would not take free of secured party's security interest in debtor's livestock because it was not one "created by his seller." *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 513 P.2d 1129 (1973).

Since Code § 9-307(1) specifically excepts from that exalted class of buyers in ordinary course of business, "a person buying farm products from a person en-

gaged in farming operations”, and since secured party had perfected security interest prior to purchase by buyer, secured party could enforce security interest in proceeds of certain peanuts which debtor had sold to buyer and which buyer had resold. *United States v. McCleskey Mills, Inc.*, 409 F.2d 1216 (5th Cir. Ga. 1969).

By excluding “farm products” from the classifications of “equipment” and “inventory,” and by expressly providing that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the draftsmen of the Code apparently intended to freeze the agricultural mortgagee into the special status he had achieved under pre-code case law. *Clovis Nat’l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

C. Buyers In Ordinary Course.

13. In general.

In marital property-division proceeding, trial court had authority under UCC § 9-311, providing that debtor’s rights in collateral may be voluntarily or involuntarily transferred by judicial process; to direct husband to transfer title to bonds, which had been pledged as security for loan, to wife. However, any title that was involuntarily transferred by judicial order would be subject, under UCC § 9-306(2), to security interests created by the pledge, since wife, as party to suit in which such transfer was made, was not buyer in ordinary course of business under UCC §§ 1-201(9) and 9-307(1) who could take collateral (bonds) free of pledgee’s security interest therein. *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App. 1978).

Where (1) plaintiff purchased used car from dealer, (2) such car, prior to plaintiff’s purchase, was subject of security agreement that defendant secured party had perfected by filing of financing statement, and (3) original purchaser of car sold it to third person, who in turn resold it to dealer from whom plaintiff purchased it, court held (1) that although plaintiff was buyer in ordinary course of business under UCC § 9-307(1), he was not protected in his purchase because security interest in car had been created by origi-

nal purchaser of car, instead of plaintiff’s seller, and (2) that plaintiff was also not protected under UCC § 9-307(2), since secured party had filed financing statement covering car before plaintiff purchased it. *Lindsley v. Financial Collection Agencies, Inc.*, 97 Misc. 2d 263 (1978).

Under UCC § 9-307(1), the secured party’s knowledge or lack of knowledge, whether actual or constructive, is immaterial to the rights of a buyer in the ordinary course of business. In other words, the status of a buyer in the ordinary course of business does not depend on what the secured party knew. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642 (1978).

UCC § 9-307(1) applies to both perfected and unperfected security interests in circumstances where the buyer buys in the ordinary course of business. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642 (1978).

Under UCC §§ 9-307(1) and 9-104(a), a security interest in an airplane held as part of a dealer inventory, which interest was duly recorded with the F.A.A. as required by federal law (see 49 USCS § 1403), is not superior to the rights of a purchaser for value from the dealer without actual notice of a security interest. In such case, although congress, by providing a federal system for registration of conveyances and liens affecting title to aircraft, did preempt that field and render state recording statutes inapplicable to such title instruments, the federal statute did not remove from resolution under state law questions concerning the validity of such title documents, actual notice, good-faith-purchaser status, and similar matters. *Bank of Hendersonville v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152 (Tenn. Ct. App. 1977), cert. denied, 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1972).

Defendant finance company did not acquire security interest in two vehicles superior to that of plaintiff bank, by virtue of automobile dealer’s execution and filing of inventory security agreements in favor of the defendant covering vehicles, where vehicles had originally been sold by dealer and conditional sales contracts were assigned to plaintiff subject to recourse con-

tract with dealer, where plaintiff had at all times had possession of certificates of ownership for vehicles and was listed as legal owner thereon, where dealer had possession of vehicles as result of their repossession by plaintiff pursuant to recourse agreement following purchasers' defaults, and where plaintiff had demanded, unsuccessfully, that dealer pay balance due on conditional sales contracts as provided by recourse agreement; under UCC § 9-204, dealer, as debtor, did not acquire rights in subject motor vehicles sufficient to transfer valid security interest to defendant; nor could defendant, by advancing flooring money to dealer be considered buyer in ordinary course of business, but was rather financing agency only, excluded from protection created by UCC § 9-307. *Mother Lode Bank v. GMAC*, 46 Cal. App. 3d 807 (3d Dist. 1975).

Insurance company which, as part of claim settlement, obtained title to car covered by security interest, was liable to secured party for unpaid balance under UCC § 9-201, even though car was total loss and had no value; insurance company was not buyer of automobiles in ordinary course of business under UCC § 9-307. *GMAC v. Allstate Ins. Co.*, 77 Misc. 2d 849 (1974).

"Buyer in ordinary course of business" does not include person buying farm products from person engaged in farming operations, under Georgia UCC § 9-307 exempting commission merchants of agricultural products from liability where sale is made in ordinary course of business without actual notice of security. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

Buyer in ordinary course is not protected by UCC § 9-307, where security interest in motor vehicle was one created by party other than immediate seller. *Muir v. Jefferson Credit Corp.*, 108 N.J. Super. 586, 262 A.2d 33 (L. Div. 1970).

The finance company to which the seller has assigned the sales contract made with a buyer in ordinary course prevails over the lender financing the seller. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

A lien in after-acquired inventory items created by a security agreement under

§ 9-204(3), if filing requirements are complied with, may be superior to a subsequently acquired contract creditor's lien or other third party claim except those of buyers in ordinary course of business under § 9-307(1) and holders of perfected purchase money security interest under § 9-312(3). *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

The policy of the Code is to favor the purchaser from inventory as against the creditor claiming a security interest in the goods. *Select Motors, Inc. v. Kemp*, 42 Pa. D. & C.2d 603 (1967).

14. Sale.

Buyers of mobile home who executed retail installment sales contract and security agreement (1) were "buyers in the ordinary course of business" under Arizona UCC § 9-307(1), even though they did not make down payment on home or take possession of it at time of entering into contract, (2) buyers' binding promise to pay was sufficient to meet requirements of Arizona UCC § 9-203(1), as amended in 1972, for attachment of security interest, and (3) security interest in home attached when buyers executed installment-purchase agreement and security agreement with seller. *Rex Fin. Corp. v. Mobile Am. Corp.*, 119 Ariz. 176, 580 P.2d 8 (1978).

Where truck dealer ordered two trucks from manufacturer, trucks were delivered under "floor plan" arrangement with manufacturer whereby dealer executed note and security agreement covering trucks, which was assigned to credit company, where purchaser executed two security agreements and notes for purchase of trucks which were assigned by dealer to purchaser's finance company, but where delivery of trucks to purchaser was delayed and, in fact, purchaser never made cash down payment and never actually took possession of trucks, there was, nonetheless, sale of trucks when purchaser executed security agreements and notes; thus, security interest obtained by purchaser's lender took priority over security interest in trucks held by dealers credit company. *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974).

15. Persons protected.

The Federal Aviation Act (see 49 USCS §§ 1403 et seq.), which provides a system

for recordation of conveyances affecting title to or security interests in civil aircraft of the United States, does not preempt the rule prescribed by UCC § 9-307(1) that a buyer in ordinary course of business takes chattels free of a security interest created by his seller. *Haynes v. GECC*, 582 F.2d 869 (4th Cir. Va. 1978).

Sale of unfinished textile fabrics by converter (i.e., one who finishes textiles into dyed and patterned fabrics) to another converter was in ordinary course of first converter's business within meaning of UCC § 9-307(1), even though predominant business purpose of converters was converting of unfinished textiles into finished fabrics, and thus second converter took fabric free from manufacturer's security interest in textiles, although manufacturer's security interest was perfected by possession of goods under UCC § 9-305, where it was shown that converters often purchased unfinished textiles in excess of their requirements, selling such excess through brokers to other converters, and that converters buy such goods if price is satisfactory or particular goods are not available from manufacturers, both of which conditions were satisfied in present case. *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 39 N.Y.2d 632, 350 N.E.2d 590 (1976).

In action by bank against purchaser of sail boat for conversion of bank's security interest in boat, evidence was sufficient to support finding that seller was dealer in boats where loan application showed that seller used business name, seller's wife said he was in business of selling boats using that name, bank knew he had boats at another location, seller held himself out to general public as dealer at boat show and represented to witness that he was dealer, seller received proceeds in checks made out to business name, order form of boat manufacturer showed seller's business as salesman, and manufacturer honored sale of boat by performing warranty work for purchaser; thus, purchaser was buyer in ordinary course of business pursuant to UCC § 1-201(9) and was entitled to protection of UCC § 9-307(1), which defeated bank's claim. *Kaw Valley State Bank v. Stanley*, 514 S.W.2d 42, 73 A.L.R.3d 333 (App. 1974).

Where mobile home buyers signed agreement to purchase mobile home from dealer, but dealer, was unable to deliver specified mobile home because it was damaged by rain, delivered substitute mobile home, which was subject to security interest held by corporation that financed dealer's inventory, buyers were buyers of substituted mobile home in ordinary course of business under UCC § 1-201(9) and were protected under UCC § 9-307(1) against enforcement of corporation's security interest. *Black v. Schenectady Dist. Corp.*, 31 Conn. Supp. 521, 324 A.2d 921 (1974).

A buyer from inventory prevails over a person lending money to the automobile dealer where at the time of the purchase the title to the automobile was represented by a blank certificate which showed the ownership still held by a former dealer although this form of certificate was illegal under the local law, which blank certificate was held by the seller, and it was only after the sale was made to the buyer that a certificate was issued which described the dealer as the owner and noted an encumbrance in favor of the lender. *Select Motors, Inc. v. Kemp*, 42 Pa. D. & C.2d 603 (1967).

16. —Dealer-purchaser.

Under UCC § 9-307(1) and § 1-201(9), buyer of collateral in ordinary course of business took free of security interest therein where secured party did not know that debtor was in business of selling goods of that kind, even though security interest was perfected by proper execution and filing of financing statement. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642 (1978).

Where automobile dealer financed his used car inventory through floor plan arrangement with finance company and, under side arrangement with second automobile dealer, satisfied his obligations to finance company by assigning used cars to second dealer, who would then issue its note to finance company in release of first dealer's note, but such cars were frequently left on first dealer's lot and sold by him on commission basis, and where first automobile dealer then entered into agreement with credit corporation to finance his new car inventory and executed

security agreement in favor of credit corporation covering his inventory, including, *inter alia*, his used car inventory: (1) Credit corporation acquired perfected security interest in first dealer's used car inventory; (2) security interest was not waived by clause in security agreement providing that private sale of chattel to dealer in such types of chattels for amount originally paid by dealer for such chattel or at lesser fair price would be "commercially reasonable disposition thereof," nor was it waived by fact that credit corporation treated dealer's used car business as completely separate from his new car business which credit corporation was financing; (3) sales of used cars to second dealer, made at arm's length, without fraud and at fair price, were sales in ordinary course of business, and, hence, second dealer acquired title to such cars free of security interest. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

Automobile dealers who purchased two new cars from another dealer may be buyers in the ordinary course of business and entitled to regain them from a finance company which repossessed the vehicles while they were still in the possession of the seller. *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972).

The purchase by an automobile dealer from another automobile dealer of a new unregistered motor vehicle that is subject to a security interest created by the seller is governed by the provisions of the Uniform Commercial Code that protect a buyer in the ordinary course of business. The fact that the transaction was between dealers and at wholesale does not preclude the buyer's status as a buyer in the ordinary course of business, but whether the sale was in the ordinary course of business presents a mixed question of law and fact which precludes summary judgment. *Associates Dist. Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546 (Tex. 1970).

A dealer may be a buyer protected by UCC § 9-307. *C. Jon Dev. Corp. v. Pand-Rorsche Corp.*, 69 Ill. App. 2d 469, 217 N.E.2d 416 (1st Dist. 1966).

17. —Bulk purchaser.

In bank's suit to have security interest in used-car dealer's inventory declared to be first and prior security interest as against interests of three persons to whom such inventory was transferred, where evidence showed that bank's security interest was perfected by filing, covered future advances, and gave bank security interest in all present and after-acquired property and proceeds; that one transferee took trust receipts and titles to specific vehicles to secure loans made to dealer and entered into security agreement granting security interest in vehicles identified in trust receipts, which agreement was filed after filing of bank's security agreement; that second transferee took trust receipts as security for loans made to dealer, but did not enter into security agreement with dealer; and that third transferee's purchase for resale of over half of dealer's inventory may have been financed by first transferee, (1) under UCC § 9-110, description of collateral in bank's security agreement included all of dealer's inventory and proceeds therefrom; (2) under UCC § 9-205, alleged failure of bank to supervise dealer's inventory properly could not constitute basis for denying equitable relief to bank; (3) security interest of first transferee was junior to bank's security interest because it was perfected after perfection of bank's interest; (4) security interest of second transferee was junior to bank's security interest because it was never perfected; and (5) security interest of third transferee was also subject to bank's security interest because such transferee was bulk purchaser under UCC § 1-201(9) and not buyer in ordinary course of business under UCC § 9-307(1). *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977).

Transferee of furniture store inventory was transferee in bulk under UCC § 6-102, rather than buyer in ordinary course of business under UCC § 9-307(1), and, having failed to request transferor to furnish list of creditors as required by UCC § 6-104(1), was subordinate to rights of secured party who had prior unperfected security interest in inventory where furniture transferred clearly represented entire inventory of transferor, where trans-

feror was retail furniture store whose principal business was sale of merchandise from stock, and where transfer was not in ordinary course of transferor's business; although transferor was retail outlet owned by furniture wholesaler, for purposes of determining whether sale was major part of inventory of enterprise within meaning of UCC § 6-102(1), only retail outlet would be considered since transferee's dealings with transferor concerned only retail outlet and its inventory, and retail outlet was, at all times, considered separate entity. *National Bank v. Frydlewicz*, 67 Mich. App. 417, 241 N.W.2d 471 (1976).

18. Good faith.

Buyer who purchased three mobile homes from mobile home dealer was not buyer in "the ordinary course of business" and was not acting "in good faith and without knowledge" when he purchased mobile homes where buyer was fully aware that secured party had floor planned and financed homes and held security interest in each home and where buyer bought three homes from dealer because he had ascertained by his own investigation that he was buying them at unusually low price. *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976).

Where buyers purchased automobiles in good faith, without knowledge that sale was in violation of secured party's security interest in automobile dealer's inventory, from dealer who was in business of selling automobiles, for present value, i.e., cash or present exchange of other property, under UCC § 9-307(1) such buyers took free of secured party's security interest. *Cunningham v. Camelot Motors, Inc.*, 138 N.J. Super. 489, 351 A.2d 402 (1975).

Commercially prudent tractor merchant may not purchase tractor from another dealer and thereby acquire title free of any prior recorded security interest without first making good faith inquiry as to existence of such previously perfected interest. *Swift v. J.I. Case Co.*, 266 So. 2d 379 (Fla. App. 1972), cert. denied, 271 So. 2d 147 (Fla. 1972).

Status as "buyers in the ordinary course of business" is to be determined by Article 1 definition of "good faith" rather than by

Article 2 standard of "reasonable commercial standard of fair dealing." *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972).

"Buyer in ordinary course of business" status within UCC § 9-307(1) is not to be determined by Article 2 test of "reasonable commercial standard of fair dealing", even where merchant buyer is involved, but by Article 9 definition, as set forth in UCC § 1-201(19), which sets up test of honesty in fact in conduct of transaction concerned. *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972).

Evidence raised substantial fact issue precluding summary judgment as to whether dealer had acted in commercially reasonable manner, in action by dealer, who had bought autos from another dealer and who had paid purchase price therefor before delivery, to recover from credit corporation claiming security interest under floor plan financing arrangement. *Sherrock v. Commercial Credit Corp.*, 269 A.2d 407 (Del. Super. 1970).

19. Giving value.

Where (1) bank, which had loaned money to debtor, held unperfected security interest in automobile put up by debtor as collateral, (2) debtor, after default in repayment of loan, fraudulently obtained duplicate title to such vehicle and assigned his joint interest therein to his sister, and (3) such assignment was made gratuitously and without sister's knowledge, court held that sister was not buyer "for value" under UCC § 9-307(2) and did not take debtor's joint interest in vehicle free from bank's unperfected security interest therein. *First Westside Nat'l Bank v. Llera*, 176 Mont. 481, 580 P.2d 100 (1978), overruled on other grounds, 259 Mont. 117, 855 P.2d 105 (1993).

Where buyers purchased automobiles in good faith, without knowledge that sale was in violation of secured party's security interest in automobile dealer's inventory, from dealer who was in business of selling automobiles, for present value, i.e., cash or present exchange of other property, under UCC § 9-307(1) such buyers took free of secured party's security interest. *Cunningham v. Camelot Motors, Inc.*, 138 N.J. Super. 489, 351 A.2d 402 (1975).

20. Knowledge of security interest.

A buyer takes free of a security interest in goods created by a seller who is in the business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201, subd [9]; § 9-307, subd [1]), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549 (1978).

Under UCC § 9-307(1) where buyer purchased new automobile from inventory of dealer in ordinary course of business, buyer took free of security interest held by bank under floor-planning arrangement, even though perfected and buyer knew of terms of security agreement. *F & M Bank & Trust v. Ksenych*, 252 N.W.2d 220 (S.D. 1977).

Buyer of airplane in ordinary course of business takes free of security interest created by seller, even though it is perfected and buyer knows of its existence. *Suburban Trust & Sav. Bank v. Campbell*, 19 Ohio Misc. 74, 250 N.E.2d 118 (1969).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

The purchaser of a new automobile from a dealer in the ordinary course of business takes free of a security interest even though perfected, and even though the buyer knows of the terms of the security agreement. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

21. Knowledge of violation.

A buyer takes free of a security interest in goods created by a seller who is in the

business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201, subd [9]; § 9-307, subd [1]), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549 (1978).

Under UCC § 9-307(1), the secured party's knowledge or lack of knowledge, whether actual or constructive, is immaterial to the rights of a buyer in the ordinary course of business. In other words, the status of a buyer in the ordinary course of business does not depend on what the secured party knew. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642 (1978).

Purchaser of cattle, which were subject to perfected security interest, was liable to secured party for value of cattle where, inter alia, secured party's financing statement was duly filed and perfected prior to sale, secured party did not authorize sale of cattle as required by security agreement, purchaser admitted he made no effort to look for filed financing statements, even though he knew his seller's cattle were mortgaged, and where purchaser transferred security to others and refused secured party's demand for payment. *First Nat'l Bank v. Conness*, 33 Ill. App. 3d 765, 338 N.E.2d 459 (3d Dist. 1975).

Buyer of tractors was not entitled to protection from manufacturer's security interest in equipment under UCC § 9-307, where buyer, who was experienced tractor dealer with knowledge of manufacturer's practice of "floor-planning" its equipment and who purchased equipment for considerably less than its value, made no investigation of prior security interest, acquiesced in falsification of retail order form, and misrepresented particulars of

transaction, did not qualify as good faith buyer in ordinary course of business under UCC §§ 1-201(9) and 1-201(19). *International Harvester Co. v. Glendenning*, 505 S.W.2d 320, 87 A.L.R.3d 1 (Tex. Civ. App. 1974).

Auto dealer executed security agreements on 13 autos; plaintiff, contemplating sale of collateral in ordinary course of business, agreed to floor plan financing; dealer subsequently transferred autos to defendant for two practically worthless checks; defendant was not without knowledge that transfer was in violation of plaintiff's security interest; held, defendant was not "buyer in ordinary course of business." *Stephenson Fin. Co. of Augusta, Inc. v. Bruce*, 254 S.C. 249, 174 S.E.2d 750 (1970).

22. When status arises.

Under UCC § 9-307(1), the secured party's knowledge or lack of knowledge, whether actual or constructive, is immaterial to the rights of a buyer in the ordinary course of business. In other words, the status of a buyer in the ordinary course of business does not depend on what the secured party knew. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642 (1978).

Even if property was previously encumbered, whether lessee-claimant occupied status of one who took auto in ordinary course of business was for jury determination precluding summary judgment for bank with security interest in same auto. *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969).

Whether a buyer buys in the ordinary course of business is determined by the circumstances as of the date of the purchase and the buyer's subsequent conduct does not affect his status if in fact he acted in good faith and without knowledge of an outstanding interest. *C. Jon Dev. Corp. v. Pand-Rorsche Corp.*, 69 Ill. App. 2d 469, 217 N.E.2d 416 (1st Dist. 1966).

23. Effect of title defects.

It is immaterial to the operation of UCC § 9-307 that the title certificate given to the buyer was signed, unknown to the buyer, with a fictitious name. *C. Jon Dev.*

Corp. v. Pand-Rorsche Corp., 69 Ill. App. 2d 469, 217 N.E.2d 416 (1st Dist. 1966).

24. Effect of federal law.

The Federal Aviation Act (see 49 USCS §§ 1403 et seq.), which provides a system for recordation of conveyances affecting title to or security interests in civil aircraft of the United States, does not preempt the rule prescribed by UCC § 9-307(1) that a buyer in ordinary course of business takes chattels free of a security interest created by his seller. *Haynes v. GECC*, 582 F.2d 869 (4th Cir. Va. 1978).

Ownership interest of buyer who bought airplane from recognized dealer in aircraft was superior to lien of defendant credit company which had loaned dealer money to purchase airplane, taken note for amount of such loan, executed security agreement whereby dealer pledged airplane and proceeds from its sale as security for payment of note, and recorded security agreement with aircraft registry office of Federal Aviation Administration pursuant to federal law (49 USCS § 1403), since (1) federal aircraft registration law, although providing that no interest in airplane could be valid in absence of federal recordation, was silent on issue of priorities among lien claimants and did not create affirmative priority of federally recorded interests as against rights declared by state law within meaning of UCC § 9-104(a); (2) defendant's security agreement, although recorded with federal aircraft registry office, also looked to Uniform Commercial Code as means by which defendant could enforce its rights; (3) buyer was purchaser in ordinary course of business from one engaged in selling goods of that kind, and sale was expressly permitted by defendant's security agreement; and (4) under UCC § 9-307(1), buyer in ordinary course of business clearly prevails over holder of security interest created by seller, even though such security interest is perfected. *Haynes v. GECC*, 432 F. Supp. 763 (W.D. Va. 1977), aff'd, 582 F.2d 869 (4th Cir. Va. 1978).

Federal Aviation Act (49 USCS §§ 1401 et seq.) preempts UCC § 9-307(1), dealing with rights of buyers in ordinary course of business, and renders properly registered security interest in airplane enforceable

against buyer in ordinary course of business who subsequently purchases such plane. *O'Neill v. Barnett Bank*, 360 So. 2d 150 (Fla. App. 1978).

Individual who purchased airplane from dealer was buyer in ordinary course of business and thus took airplane free of bank's prior security interest under UCC § 9-307, notwithstanding bank had duly filed aircraft chattel mortgage with Federal Aviation Aircraft Registry pursuant to Federal Aviation Act. *Idabel Nat'l Bank v. Tucker*, 544 P.2d 1287 (Okla. Ct. App. 1975).

Under UCC §§ 9-307(1) and 9-104(a), a security interest in an airplane held as part of a dealer inventory, which interest was duly recorded with the F.A.A. as required by federal law (see 49 USCS § 1403), is not superior to the rights of a purchaser for value from the dealer without actual notice of a security interest. In such case, although congress, by providing a federal system for registration of conveyances and liens affecting title to aircraft, did preempt that field and render state recording statutes inapplicable to such title instruments, the federal statute did not remove from resolution under state law questions concerning the validity of such title documents, actual notice, good-faith-purchaser status, and similar matters. *Bank of Hendersonville v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152 (Tenn. Ct. App. 1977), cert. denied, 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1972).

Holder of prior recorded security interest in new airplane prevailed over subsequent buyer in ordinary course of business, from duly authorized dealer, where buyer neither recorded his own title nor searched Federal Aviation Agency records to discover security holder's prior claim. *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P.2d 401 (1970), cert. denied, 404 U.S. 823, 92 S. Ct. 45, 30 L. Ed. 2d 50 (1971).

25. Security interests as to which buyer takes free.

Under UCC § 9-307(1) and § 1-201(9), buyer of collateral in ordinary course of business took free of security interest therein where secured party did not know that debtor was in business of selling

goods of that kind, even though security interest was perfected by proper execution and filing of financing statement. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642, 25 U.C.C. Rep. Serv. 326 (1978); *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4, 24 U.C.C. Rep. Serv. 1366 (Tex. Civ. App. 1978), writ ref n r e, reh'g of writ of error overruled (Dec 6, 1978).

The Federal Aviation Act (see 49 USCS §§ 1403 et seq.), which provides a system for recordation of conveyances affecting title to or security interests in civil aircraft of the United States, does not preempt the rule prescribed by UCC § 9-307(1) that a buyer in ordinary course of business takes chattels free of a security interest created by his seller. *Haynes v. GECC*, 582 F.2d 869 (4th Cir. Va. 1978).

UCC § 9-307(2) gives protection to the buyer of consumer goods against a perfected security interest under specified circumstances. The statute is limited in its application to transactions between a consumer seller and a consumer buyer, and the goods must be consumer goods in the hands of both buyer and seller. However, a buyer does not take free of a security interest under UCC § 9-307(2) where, prior to the purchase, a financing statement has been filed with respect to the security interest. *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245 (Miss. 1978).

A buyer takes free of a security interest in goods created by a seller who is in the business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201, subd [9]; § 9-307, subd [1]), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549 (1978).

Where savings and loan association, entered into floor-plan agreement with mobile-home dealer under which association would pay manufacturer for each home delivered to dealer, retain invoice and certificate of origin of each delivered unit, and dealer would execute demand note and security interest in delivered unit to association which it would hold until it received payment from dealer; where buyers of mobile home from dealer subsequently executed instalment contract reciting payment of specified down payment, delivery and acceptance of home, and granting by buyers of security interest therein; and where dealer assigned such contract to corporation that assigned it to defendant bank, and money paid for contract by defendant bank was transmitted to dealer who breached his obligation to savings and loan association and absconded, in action by subrogee of rights of savings and loan association against defendant bank to determine priority of security interests in such home, (1) buyers of home were good-faith purchasers in ordinary course of business under UCC § 1-201(9) who took home under UCC § 9-307(1) free of subrogee's security interest therein; (2) defendant bank's security interest in home therefore had priority over subrogee's security interest; and (3) subrogee's security interest attached to proceeds of sale in hands of absconding dealer. *Integrity Ins. Co. v. Marine Midland Bank-Western*, 90 Misc.2d 868 (1977).

Where Georgia Motor Vehicle Certificate of Title Act expressly provided that it did not apply to or effect security interest in vehicle that was created by manufacturer or dealer who held vehicle for sale, and that buyer in ordinary course of trade from manufacturer or dealer would take vehicle free of such security interest, perfection of security interest in dealer's floor-planned vehicle would come under Georgia Uniform Commercial Code and priority as to such security interest would be governed by Georgia UCC § 9-307(1), which provides that buyer in ordinary course of business takes free of security interest created by his seller, even though such security interest is perfected and buyer knows of its existence. *Rome Bank*

& Trust Co. v. Bradshaw, 143 Ga. App. 152, 237 S.E.2d 612 (1977).

Individual who purchased airplane from dealer was buyer in ordinary course of business and thus took airplane free of bank's prior security interest under UCC § 9-307, notwithstanding bank had duly filed aircraft chattel mortgage with Federal Aviation Aircraft Registry pursuant to Federal Aviation Act. *Idabel Nat'l Bank v. Tucker*, 544 P.2d 1287 (Okla. Ct. App. 1975).

Evidence supported finding that automobile leasing company was in business of selling used automobiles and that defendant, who had purchased 10 automobiles from leasing company over period of years, was buyer in ordinary course of business who was entitled to take automobile free of security interest created by leasing company. *American Nat'l Bank & Trust Co. v. Mar-K-Z Motors & Leasing Co.*, 11 Ill. App. 3d 1046, 298 N.E.2d 209 (1st Dist. 1973), *aff'd*, 57 Ill. 2d 29, 309 N.E.2d 567 (1974).

Auto purchase made from auto dealer's inventory in ordinary course of business without notice of trust security agreement between dealer and bank; held, buyer acquired title free of bank's trust security lien. *Correria v. Orlando Bank & Trust Co.*, 235 So. 2d 20 (Fla. App. 1970).

Auto displayed on dealer's floor for resale; president of corporate dealer made no effort to claim personal ownership thereof; held, sale was in ordinary course of business and buyer took free of security interests created by president on such auto. *GMAC v. Keil*, 176 N.W.2d 837 (Iowa 1970).

The purchaser of a new automobile from a dealer in the ordinary course of business takes free of a security interest even though perfected, and even though the buyer knows of the terms of the security agreement. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

The buyer of an automobile in the ordinary course of business from an automobile dealer takes the car free of any perfected security interest. *Murphy v. Plymouth Nat'l Bank*, 22 Mass. App. Dec. 36 (1961).

26. Security interests as to which buyer takes subject.

Under UCC §§ 9-306(2) and 9-307(1), secured party's perfected security interest in cotton crop followed debtor's sale of crop to cotton buyer, and buyer was liable to secured party for any sums paid debtor for such cotton that debtor had not remitted to secured party. *Oxford Prod. Credit Ass'n v. Dye*, 368 So. 2d 241 (Miss. 1979).

UCC § 9-307(2) gives protection to the buyer of consumer goods against a perfected security interest under specified circumstances. The statute is limited in its application to transactions between a consumer seller and a consumer buyer, and the goods must be consumer goods in the hands of both buyer and seller. However, a buyer does not take free of a security interest under UCC § 9-307(2) where, prior to the purchase, a financing statement has been filed with respect to the security interest. *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245 (Miss. 1978).

Where (1) first creditor filed financing statement covering present and future inventory of motor-home retailer, (2) retailer thereafter acquired motor home from manufacturer and placed it in retailer's inventory for resale, (3) second creditor made loan to retailer and filed financing statement on such motor home without determining whether any prior financing statements were on file, (4) second creditor thereafter filed application for title certificate for home, which was issued five months later and indicated that retailer was home's owner and that second creditor was first lienholder, and (5) on retailer's default on loan, second creditor filed declaratory-decree action seeking to have its lien determined to be superior to that of first creditor, court held (1) that when first creditor filed financing statement on retailer's inventory, no title certificate or manufacturer's certificate of origin was in existence and thus first creditor could only protect its lien right by filing financing statement under Florida Uniform Commercial Code, (2) that both Florida Uniform Commercial Code, in § 9-302(3)(b), and Florida Motor Vehicle Title Certificates Act provide that lien recording provisions of Uniform Commer-

cial Code, rather than those of Motor Vehicle Title Certificates Act, govern liens on motor vehicles held as inventory, (3) that at time of second creditor's loan to retailer, second creditor knew that no title certificate had been issued, (4) that first creditor was entitled to rely on its financing statement as notice to second creditor of first creditor's prior lien, (5) that second creditor was not buyer in ordinary course of business under UCC § 9-307(1), and (6) that since second creditor was not buyer in ordinary course of business, first creditor's security interest in motor home was superior to that of second creditor. *Borg-Warner Acceptance Corp. v. Atlantic Bank*, 364 So. 2d 35 (Fla. App. 1978).

A buyer takes free of a security interest in goods created by a seller who is in the business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201, subd [9]; § 9-307, subd [1]), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549 (1978).

Plaintiff, who purchased a used automobile from a car dealer which was subject to an outstanding security instrument lien created by an earlier owner, is not entitled to protection from the prior perfected security interest afforded to consumers under subdivision (1) of section 9-307 of the Uniform Commercial Code which provides that a "buyer in ordinary course of business...takes free of a security interest created by his seller", since the security interest in question was not created by plaintiff's seller, but was instead created by an earlier owner. Plaintiff is not entitled to any additional protection from the existing security interest since a finance statement covering the automobile had been filed. (Uniform Com-

mercial Code, § 9-307, subd [2].) Accordingly, plaintiff's purchase from the car dealer is subject to the perfected security interest. *Lindsley v. Financial Collection Agencies, Inc.*, 97 Misc. 2d 263 (1978).

Where (1) plaintiff purchased used car from dealer, (2) such car, prior to plaintiff's purchase, was subject of security agreement that defendant secured party had perfected by filing of financing statement, and (3) original purchaser of car sold it to third person, who in turn resold it to dealer from whom plaintiff purchased it, court held (1) that although plaintiff was buyer in ordinary course of business under UCC § 9-307(1), he was not protected in his purchase because security interest in car had been created by original purchaser of car, instead of plaintiff's seller, and (2) that plaintiff was also not protected under UCC § 9-307(2), since secured party had filed financing statement covering car before plaintiff purchased it. *Lindsley v. Financial Collection Agencies, Inc.*, 97 Misc. 2d 263 (1978).

Where (1) new mobile home was purchased by original buyer and seller assigned its security interest to plaintiff bank which perfected such interest by obtaining certificate of title which showed original buyer's ownership of home and plaintiff's security interest therein, (2) where original buyer later defaulted in making payments to plaintiff bank, seller reacquired home under circumstances not disclosed by the evidence and sold it as used vehicle to second buyer under purchase agreement reserving security interest that seller assigned to second bank not involved in suit, and (3) where second buyer signed application for title certificate to vehicle and was told by seller that second bank would retain certificate until purchase-money lien on vehicle was satisfied, second buyer could not successfully rely on UCC § 9-307(1) to defeat validity perfected security interest of plaintiff (the first bank), on ground that such section applied to case because seller as party to original contract of sale with original buyer had created security interest that was basis of plaintiff's claim, since plaintiff's security interest was created not by seller but by original buyer of vehicle from seller. *First Am. Bank v. Hunning*, 218 Va. 530, 238 S.E.2d 799 (1977).

Where the conditional purchaser of an automobile sold the car to a dealer without consent of the assignee of the conditional vendor, and the defendant innocently bought the vehicle from the dealer; the purchaser did not take free of the security interest held by the assignee of the conditional vendor, since UCC § 9-307(1) would permit him to take free only of a security interest created by his seller. *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

Where a manufacturer of garden supplies distributed its products only through authorized dealers and its financing subsidiary took trust receipts on the goods sold expressly prohibiting dealers to resell except to authorized consumers, and the security interest had been established according to law, goods purchased from a dealer by a discount house with knowledge of provisions of the trust receipt took the same subject to the manufacturer's security interest. *O.M. Scott Credit Corp. v. Apex Inc.*, 97 R.I. 442, 198 A.2d 673 (1964).

27. Conversion action or the like.

Auctioneer who as agent of debtor sold collateral subject to perfected security interest held by agency of United States (FHA) and remitted proceeds to debtor was guilty of conversion, even though auctioneer had no actual knowledge of security agreement, where debtor had right to sell collateral but not right to retain proceeds. In such case, because converter of secured property is strictly liable for such tort, auctioneer's liability was primary and not derivatively acquired from debtor. *United States v. Gallatin Livestock Auction, Inc.*, 448 F. Supp. 616 (W.D. Mo. 1978), *aff'd*, 589 F.2d 353 (8th Cir. Mo. 1978).

Purchaser of automobile covered by security interest was liable to secured party for conversion where automobile dealer, who was indebted to purchaser for \$10,000, gave purchaser check for \$5,000 in partial satisfaction of such debt, and purchaser indorsed check back to dealer in payment for automobile: (1) when dealer executed and delivered check to purchaser, it did not alter fact that dealer was still indebted to purchaser for \$10,000 and when purchaser indorsed

check back to dealer in payment for automobile, transaction constituted transfer of automobile for or in partial satisfaction of money debt and purchaser was not, therefore, "buyer in ordinary course of business" within meaning of UCC § 1-201(9), whether or not he acted in good faith and whether or not at time he received check he intended to exchange it for automobile; (2) since purchaser was not "buyer in ordinary course of business" he did not take automobile free from security interest under UCC § 9-307(1), but took it subject thereto under UCC § 9-306(2), and he converted secured party's security interest when he took possession of car through unauthorized sale by dealer, removed it from dealer's place of business in violation of terms of security agreement, and began driving it as his family car. *Chrysler Credit Corp. v. Malone*, 502 S.W.2d 910 (Tex. Civ. App. 1973).

Where A sold two television sets to B, who was not in business of selling televisions, and B quickly resold them to C, a pawnshop, A's security interest, although unrecorded, was effective against pawnbroker in conversion suit against C who resold sets, even though C was acting in good faith and even though A had made no demand for sets when they were in C's possession. *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658 (Tex. Civ. App. 1972).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

Although a bank's security agreement expressly provided that the debtor would not sell or otherwise dispose of the cattle which were its security without its written consent, the fact that the bank had permitted, acquiesced in, and consented to the debtor's making a series of sales of cattle at auction through the defendant's commission house and market agency without requiring that its prior written consent be obtained constituted a waiver of the bank's possessory rights in the

security, and the court held that the defendant had not wrongfully converted the cattle in which the bank had an enforceable security interest, and that he was not responsible for the debtor's failure to remit the proceeds of the sales to the bank. *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967).

D. Buyers of Consumer Goods.

28. In general; transactions contemplated.

Code § 9-307(2) applies only in case of purchase of goods by one consumer from another consumer, being inapplicable to purchase of goods by consumer from nonconsumer. *Everett Nat'l Bank v. Deschuiteneer*, 109 N.H. 112, 244 A.2d 196 (1968).

A judgment creditor who purchases consumer goods, including in Massachusetts an automobile, at an execution sale to satisfy his judgment, even though he did not know of a perfected security interest in the goods and he purchased for value for his own personal use, is not within the protection of subsection (2) of the instant section because such a purchase does not come within the code definition of purchase [§ 1-201(32)] as a voluntary transaction, because there is nothing in the code indicating any intent to change prior Massachusetts law under which the execution purchaser would not have been protected, and because to allow a security interest to be wiped out by such a transaction would make of little avail the perfecting of security interests in consumer goods without the necessity for filing. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

The holder of a purchase money security interest in a household laundry dryer, which was within the definition of "consumer goods," could maintain an action against a used household appliance dealer who purchased property from the defaulting debtor for the purpose of resale, although no financing statement had been filed. *United Gas Imp. Co. v. McFalls*, 18 Pa. D. & C.2d 713 (1959).

29. Motor vehicles distinguished.

Where dealer assigned title to used car to salesman who used title as collateral to

obtain bank loan; where bank perfected security interest in car by timely filing, but such lien, not being required by state law to be recorded on certificate of title in order to be perfected, was not so recorded; and where car was thereafter sold for cash to buyer who took possession of vehicle, in bank's replevin action to obtain possession of car, (1) buyer's claim that bank's perfected security interest was cut off by UCC § 2-403(2) could not be sustained, since bank was not owner of car and thus could not be its "entruster" under UCC § 2-403(2); but (2) since nothing in comments to UCC Art 9 requires "created by his seller" limitation in UCC § 9-307(1) to be insurmountable barrier to good faith acquisition of preencumbered property from dealer who was instrumental in creating encumbrance on, and conflict of rights to, such property, buyer's right to possession of car was protected by "created by his seller" provision in UCC § 9-307(1), on theory that same entity (dealer) both created security interest in car and later sold car to "buyer in ordinary course of business," and bank's security interest in car therefore terminated on its sale to buyer. *Adams v. City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977).

Where mobile home dealer sold mobile home to first purchaser, sale was financed by retail instalment contract held by secured party, certificate of title was issued by Department of Motor Vehicles to first purchaser showing secured party as lienholder, first purchaser defaulted and returned possession of mobile home to dealer, and dealer then sold mobile home to second purchaser, without knowledge or consent of secured party, second purchaser did not take mobile home free from secured party's security interest; second purchaser was not protected by UCC § 9-307(1), since security interest in mobile home was not created by seller but by first purchaser; nor was second purchaser protected by UCC § 9-307(2), since secured party's interest was protected, not by filing a financing statement, but by issuance of certificate of title listing secured party as lienholder. *Black v. Schenectady Disct. Corp.*, 31 Conn. Supp. 521, 324 A.2d 921 (1974).

Rule that dealer having authority to expose floor plan cars for sale in ordinary

course of business binds his mortgagee to deliver title to any car so sold, when payment is made to dealer and whether or not dealer remits proceeds to his mortgagee, unless buyer knows or should have known of financing arrangements, or unless contract of sale can and does expressly limit warranty of title given, was not affected or undermined by subsequent adoption of article 9 of UCC; although in adopting Code, Ohio general assembly modified language of UCC to provide that § 9-307 does not apply in motor vehicle title cases, and though UCC § 9-205 repudiates, as against creditors, common law rule which held floating liens void as matter of law, protection afforded purchaser in ordinary course of business was expanded to provide absolute protection in cases other than purchases of motor vehicles; however, it cannot from this be concluded that buyer of vehicle is left unprotected, only that Commercial Code, as adopted, fails to speak to issue and recourse must be had to common law and other statutory law. *Levin v. Nielsen*, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973).

Finding that ultimate buyers of automobiles were good faith consumers purchasers for value from consumer seller without knowledge of automobile dealers' security interest which had not been filed was correct, where evidence indicated that buyers knew person who made approaches which culminated in sales in question, had learned from inquiries that asking price of cars was consistent with prices at which such cars could be bought, and had purchased car previously from contact man without any untoward incidents, and where there was no evidence that buyers had actual knowledge of status of title to cars in question. *Balon v. Cadillac Auto. Co.*, 113 N.H. 108, 303 A.2d 194 (1973).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

The fact that title has not yet been transferred as between the dealer and the

consumer does not prevent the latter from being regarded as a buyer in the ordinary course of business, insofar as the secured creditor of the dealer is concerned, where the transaction between the dealer and the consumer is ordinary or typical in the trade. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

Where the buyer of an automobile cannot make the cash down payment but trades in her automobile and makes a specific promise as to when she will pay the cash she is to be deemed in ordinary course. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

Where a buyer, in the ordinary course of business, bought and accepted an automobile from a dealer in the business of selling cars from inventory at a time when no security interest had been placed on the automobile, a trust receipt security interest executed 11 days later by the dealer with a finance company passed no security interest in the car sold to the buyer, even if the automobile was a used one and even though the buyer had received only a temporary registration transfer certificate and bill of sale at the time of purchase and a certificate of title to the automobile was subsequently issued to the finance company. *Main Inv. Co. v. Gisolfi*, 203 Pa. Super. 244, 199 A.2d 535 (1964).

The purchaser of a new automobile from a dealer in the ordinary course of business takes free of a security interest even though perfected, and even though the buyer knows of the terms of the security agreement. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

An acceptance company which had made loans to a dealer was required to look to the dealer for repayment, rather than to a new automobile in possession of one who had purchased it from the dealer in the ordinary course of business, paying the full purchase price therefor, notwithstanding that the acceptance company had filed a blanket security agreement executed by the automobile dealer, who had also executed and delivered to the acceptance company a trust receipt agreement describing the automobile in question. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

Where notwithstanding that buyer who bought an automobile from the dealer out of inventory and in ordinary course of business had paid the full purchase price, the dealer thereafter fraudulently executed a collateral mortgage with the identical automobile as security in favor of a bank with whom dealer had an existing floor plan agreement, the transaction between the dealer and the bank was void as to the buyer. *Weisel v. McBride*, 191 Pa. Super. 411, 156 A.2d 613 (1959).

30. Knowledge.

Where Georgia Motor Vehicle Certificate of Title Act expressly provided that it did not apply to or effect security interest in vehicle that was created by manufacturer or dealer who held vehicle for sale, and that buyer in ordinary course of trade from manufacturer or dealer would take vehicle free of such security interest, perfection of security interest in dealer's floor-planned vehicle would come under Georgia Uniform Commercial Code and priority as to such security interest would be governed by Georgia UCC § 9-307(1), which provides that buyer in ordinary course of business takes free of security interest created by his seller, even though such security interest is perfected and buyer knows of its existence. *Rome Bank & Trust Co. v. Bradshaw*, 143 Ga. App. 152, 237 S.E.2d 612 (1977).

31. Personal, family, or household purpose.

In *National Shawmut Bank v. Vera* (1967) 352 Mass 11, 223 NE2d 515, 4 UCCRS 1, it was assumed that under subsec. 2 of the instant section, one who innocently buys for his own personal purposes consumer goods from another consumer takes the goods free of a security interest in the goods which has been perfected without filing. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

32. Farm products (prior to 1977 amendment).

Under UCC § 9-307(1), one who buys farm products from person engaged in farming operation takes products subject to any security interest therein. *Southwest Wash. Prod. Credit Ass'n v. Seattle-*

First Nat'l Bank, 19 Wash. App. 397, 577 P.2d 589 (1978), overruled on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

One who bought beans from a seller engaged in farming operations could not be classified as a buyer in the ordinary course of business under UCC § 9-307(1). *United States v. Hughes*, 340 F. Supp. 539 (N.D. Miss. 1972).

E. Buyers not in Ordinary Course; Future Advances.

33. In general.

Judgment creditor who bid in at farm auction sale conducted with consent of secured party, debtors, and judgment creditor was not buyer in "ordinary course of business." *South Omaha Prod. Credit Ass'n v. Tyson's, Inc.*, 189 Neb. 702, 204 N.W.2d 806 (1973).

One who receives only security interest for money debt cannot qualify as "buyer in ordinary course of business" within UCC § 9-307(1). *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972).

One who buys an auto from a seller who is not engaged in the selling of autos as a systematic economic enterprise cannot qualify as a "buyer in the ordinary course of business" within UCC § 9-307. *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

Party causing sheriff to levy upon mobile home to satisfy debt is not "buyer in ordinary course of business" within UCC § 9-307(1), but is lien creditor who must take secondary place to perfected security interest. *Troy Lumber Co. v. Williams*, 124 Ga. App. 636, 185 S.E.2d 580 (1971).

Auto wholesaler purchased autos in which bank held security interest from auto leasing and rental company; held, this was not purchase from person engaged in business of selling cars and wholesaler was not entitled to "buyer in ordinary course of business" status. *Hempstead Bank v. Andy's Car Rental Sys.*, 35 A.D.2d 35 (2d Dep't 1970).

Sale of autos was not in "ordinary course of business" where sale took place at usual place of business of neither buyer nor seller, but on auction lot of third party in state where neither buyer nor seller was doing business. *Rhode Island Hosp. Trust Co. v. Leo's Used Car Exch., Inc.*, 314 F. Supp. 254 (D. Mass. 1970).

Buyer who took supplies in satisfaction of antecedent indebtedness was not buyer in ordinary course within Code § 9-307(1). *United States v. Greenwich Mill & Elevator Co.*, 17 Ohio Misc. 71, 291 F. Supp. 609 (N.D. Ohio 1968).

Attaching creditor does not qualify as buyer in ordinary course of business within Code § 9-307(1). *Mechanics Nat'l Bank v. Parker*, 109 N.H. 87, 242 A.2d 69 (1968).

RESEARCH REFERENCES

ALR. Motor vehicle certificate of title or similar document, in hands of one other than legal owner, as indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interests. 18 A.L.R.2d 813.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1). 73 A.L.R.3d 338.

Construction of UCC § 9-307(3) providing that under certain conditions a buyer, other than a buyer in the ordinary course of business, takes free of a security inter-

est securing "future advances". 35 A.L.R.4th 390.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 825 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:461 et seq. (priorities and protection of purchasers; buyer of goods).

CJS. 79 C.J.S., Secured Transactions § 93.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.

(a) In this section, “licensee in ordinary course of business” means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor’s own usual or customary practices.

(b) A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.

SOURCES: Derived from 1972 Code §§ 75-2A-103 [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994] and 75-2A-307 [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) For the purposes of subsection (a) (1):

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under

Section 75-9-327, 75-9-328, 75-9-329, 75-9-330, or 75-9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

(A) The security interest in proceeds is perfected;

(B) The proceeds are cash proceeds or of the same type as the collateral; and

(C) In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Subsections (a) through (e) are subject to:

(1) Subsection (g) and the other provisions of this part;

(2) Section 75-4-210 with respect to a security interest of a collecting bank;

(3) Section 75-5-118 with respect to a security interest of an issuer or nominated person; and

(4) Section 75-9-110 with respect to a security interest arising under Article 2 or 2A.

(g) A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

SOURCES: Derived from former 1972 Code § 75-9-312 [Codes, 1942, § 41A:9-312; Laws, 1966, ch. 316, § 9-312; Laws, 1977, ch. 452, § 21; Laws, 1986, ch. 343, § 2; Laws, 1990, ch. 384, § 54; Laws, 1996, ch. 468, § 69, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Security interest of collecting bank in items, accompanying documents, and proceeds, see § 75-4-208.

JUDICIAL DECISIONS

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1.-5. [Reserved for future use.]

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F. Decisions Under Former Statutes.

34. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-312.

A. In General.

6. Generally.

UCC § 9-312 sets forth criteria for determining priority of conflicting security interests. The sections enumerated in subsection (1) of UCC § 9-312 list specific statutes for specific problems in priority and take precedence over the general rules or priorities between conflicting security interests in subsections (2) through (6). *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

With respect to the distinction between "attachment" and "perfection" of a security interest, "perfection" is significant only when the question involves priority between security interests. "Attachment," on

the other hand, determines the existence of a security interest as between the seller and the purchaser. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Lack of perfection of security interest under Article 9 of UCC relates only to priority over other creditors' interests in collateral, and security agreement as between parties themselves and secured party's rights over collateral as against debtor are unaffected by failure to perfect security interest; thus, assignee for security purposes of beneficial interest in land trust was entitled to redeem from tax sale of real estate which comprised corpus of trust notwithstanding his failure to perfect security interest by filing financing statement. *Application of County Treasurer of Du Page County* (App. 2 Dist.1973) 16 Ill.App. 3d 385, 306 N.E.2d 743

While the rights of a third person can rise no higher than those of the holder of the prior interest, the third person was not limited in the enforcement of its claim to the amount paid by the third person to the holder of the prior interest less amounts received by the third person from the debtor. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

Real estate mortgages are not to be viewed as security agreements merely because they happened to contain provisions relating to attached personalty. In *re Royer's Bakery, Inc.*, 58 Lanc. L. Rev. 405 (Pa 1963).

7. Effect of title.

In determining priorities it is immaterial whether title to collateral is in the secured party or the debtor. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

B. General Rules of Priority.

8. In general; scope.

Failure of creditor with perfected purchase money security interest to renew original filing relegated creditor to standing of unperfected secured creditor; creditor did not reperfect its purchase money lien upon repossession of collateral, due to 20-day perfection requirement. *United States v. Williams*, 82 B.R. 430 (Bankr. N.D. Miss. 1988).

Enactment of priority provisions of Ohio UCC § 9-312 did not preclude imposition of equitable liens in all situations, in light of Ohio UCC § 1-103 dealing with supplementation of Ohio Uniform Commercial Code by existing principles of law and equity. *General Ins. Co. of Am. v. Lowry*, 10 Ohio Op. 3d 138, 570 F.2d 120 (6th Cir. Ohio 1978).

UCC § 9-312 sets forth criteria for determining priority of conflicting security interests. The sections enumerated in subsection (1) of UCC § 9-312 list specific statutes for specific problems in priority and take precedence over the general rules or priorities between conflicting security interests in subsections (2) through (6). *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Since television set and tape player were consumer goods, filing was not necessary to perfect purchase money security interest of conditional seller who thus had priority over security interest of pawnbroker who subsequently took possession of goods as security for loan. *Kimbrell's Furn. Co. v. Friedman*, 261 S.C. 172, 198 S.E.2d 803 (1973).

Holder of purchase money security interest had priority over conflicting security interest of another creditor who had acquired subsequently executed chattel mortgage on same collateral. *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972).

In priority situation of UCC § 9-312(5), perfection of security interest by mortgagee is sufficient to defeat claims by trustee in bankruptcy under § 70(c) of the Bankruptcy Act. *August v. Poznanski*, 383 Mich. 151, 174 N.W.2d 807 (1970).

9. Effect of notice.

Although debtor's attorneys, by taking possession of debtor's stock pursuant to pledge agreement, perfected their security interest therein and, under UCC § 9-312, attorneys' rights in stock would prevail over secured party's prior unperfected security interest, secured party would be granted equitable lien against stock superior in priority to later perfected security interest held by attorneys where one attorney was not merely disinterested credi-

tor who attempted to protect his commercial interests but was debtor's attorney and, together with his client, as witness and obligor respectively, signed agreement whereby secured party obtained security interest in stock. *General Ins. Co. of Am. v. Lowry*, 412 F. Supp. 12 (S.D. Ohio 1976), *aff'd*, 570 F.2d 120, 10 Ohio Op. 3d 138 (6th Cir. Ohio 1978).

Security interest of creditor which was properly filed and perfected prior to time security interest of second creditor in same collateral (appliances) was either properly filed or perfected had priority under UCC § 9-312(5)(a), and such priority was not affected by first creditor's alleged knowledge of contents of second creditor's security agreement with debtor based on receipt of partial copy of such agreement, since under UCC § 9-401(2) knowledge of contents of a creditor's improperly filed financing statement and not knowledge of such creditor's security agreement with his debtor is what is necessary to render effective a good-faith but improperly filed financing statement. In *re County Green Ltd. Partnership*, 438 F. Supp. 693 (W.D. Va. 1977).

Since only statutory landlord's liens are excluded by UCC § 9-104(b) from operation of Article 9 of Uniform Commercial Code, prior contractual landlord's lien in personal property of debtor, which was expressly provided for in debtor's lease of certain realty but which landlord did not perfect as security interest by filing of proper financing statement under Article 9, was not superior to bank's subsequent security interest in same property which bank perfected by filing of proper financing statements. Moreover, bank in such case was not precluded from asserting under UCC § 9-312(5)(a) priority of its subsequently perfected security interest by fact that at time it extended credit to debtor and perfected security interest in debtor's property, it had actual knowledge of landlord's prior unrecorded contractual lien on such property, since it had notified landlord about loan it proposed to make to debtor and also had requested landlord to subrogate his interest to such loan, and landlord at that time could have perfected his contractual lien in debtor's property by filing proper financing statement covering

such property. *Bank of N. Am. v. Kruger*, 551 S.W.2d 63 (Tex. Civ. App. 1977), writ *ref'd n.r.e.*, (July 13, 1977).

When the holder of a security interest perfects the same, subsequent purchasers and encumbrancers are charged with notice of such perfected interest. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

10. Perfected interest; order of filing.

Since financing statement may be filed before security interest itself attaches, test for determining priority of competing security interests under Mississippi UCC § 9-312(5)(a) is not when such interests attached but order and time of their filing. *In re Hammons*, 438 F. Supp. 1143 (S.D. Miss. 1977), *rev'd* on other grounds, 614 F.2d 399 (5th Cir. 1980).

In action to determine priorities of assignments made by owner of condemned land to proceeds of condemnation award, (1) under UCC § 9-301(1)(a) and § 9-312(5)(a), assignee which had first perfected its security interest by filing financing statement with secretary of state had first priority in such proceeds, (2) assignee which had perfected its security interest by filing after date on which holder of first priority had filed had second priority, (3) assignee which had never filed financing statement had third priority, and (4) all of such priorities were subordinate to lien of attorney for owner of the condemned land, even though attorney's notice of intent to enforce his attorney's lien was not filed in record of action until after both perfected creditors had filed their financing statements, since under circumstances of case, such creditors had duty to inquire about status of attorney's lien. *Board of County Comm'rs v. Berkeley Village*, 40 Colo. App. 431, 580 P.2d 1251 (1978).

Where (1) secured party's loan to debtor was secured by interest in debtor's ac-

counts receivable, (2) after loan was made, debtor sold goods to third party, who was obligated to pay debtor specified sum therefore, (3) debtor owed money to still another third party and entered into arrangement with both third parties whereby money owing to debtor from first third party would be set off against money that debtor owed to second third party, and (4) secured party sought to pierce such arrangement and reach receivables owed to debtor by first third party, court held that in absence of proof that arrangement between debtor and such third parties predated secured transaction between plaintiff and debtor, plaintiff's perfected security interest prevailed under UCC § 9-312 over the presumably subsequent and unperfected security interest of second third party. *Bank Leumi Trust Co. v. Collins Sales Serv., Inc.*, 65 A.D.2d 735 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 888, 419 N.Y.S.2d 474, 393 N.E.2d 468 (1979).

In action between creditors for possession of debtors' (husband and wife) collateral, where (1) (a) plaintiff creditor's security agreement, which did not provide for future advances, covered debtors' household furnishings, (b) plaintiff properly filed financing statement on December 20, 1973, (c) debt was fully paid on November 8, 1974, and (d) plaintiff did not file termination statement, (2) defendant creditor's security agreement covered essentially the same property, and defendant properly filed financing statement on January 3, 1975, (3) (a) plaintiff creditor, on July 11, 1975, December 1, 1975, and July 2, 1976, made new loans to debtors, (b) debtors executed new security agreements covering same collateral first pledged in 1973, and (c) plaintiff relied on December 20, 1973 financing statement, (4) debtors filed petition in bankruptcy on September 23, 1976, and (5) defendant creditor, on September 30, 1976, seized property covered by both plaintiff's and defendant's perfected security interests, court held (1) that all loans made by plaintiff and defendant, except plaintiff's July 2, 1976 loan, were governed by pre-1972 UCC § 9-312(5)(a), which determined priority between conflicting security interests in same collateral by order of filing if both were perfected by filing, (2)

under pre-1972 UCC § 9-312(5)(a), plaintiff's security interest in collateral for plaintiff's July 11, 1975 and December 1, 1975 loans, which was perfected at time such loans were made, had priority over defendant's security interest in the same collateral because plaintiff was the first to file, (3) such priority was not affected by fact that plaintiff's original loan, which was covered by plaintiff's filed financing statement of December 20, 1973, had been paid off, since under pre-1972 UCC § 9-403(2), a financing statement specifying no maturity date was effective for five years from date of its filing, and debtors had not requested that they be sent a termination statement, (4) under UCC § 9-312(7), which was added to Uniform Commercial Code in 1972, plaintiff's July 2, 1976 advance had same priority as plaintiff's December 1, 1975 advance, thus giving plaintiff's July 2, 1976 loan priority over defendant's loan, (5) since only one of the debtors-the wife-had properly signed plaintiff's December 20, 1973 financing statement, plaintiff's security interest had priority over defendant's security interest only to extent of wife's interest in collateral, and (6) conversely, defendant's security in property of husband, and also in property of wife that was not listed in plaintiff's December 20, 1973 financing statement, had priority over plaintiff's security interest under pre-1972 UCC § 9-301 (1)(a) and § 9-312 (5)(a). *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 245 S.E.2d 510 (1978), cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

In action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached under UCC § 9-204(1) and § 9-204(2)(a) at exactly the same time (when crops were planted), and where, because debtor owed installments to plaintiff within six months of planting his crops, defendant's security interest was not entitled to priority under UCC § 9-312(2) over plaintiff's security interest, plaintiff's security interest, which was perfected by filing of financial statement before defendant perfected his security interest by filing such a statement, was entitled under UCC

§ 9-312(5)(a) to priority over security interest of defendant. *United States v. Minster Farmers Coop. Exch., Inc.*, 430 F. Supp. 566 (N.D. Ohio 1977).

Where bank acquired perfected security interest in payloader when original financing statement was filed in 1971, prior to time finance company obtained perfected security interest in same collateral in 1972, and where bank advanced an additional sum in 1974 including amount owing on original loan, bank's 1971 filing gave it priority over finance company under first to file rule of UCC § 9-312. *Thorp Fin. Corp. v. Ken Hodgins & Sons*, 73 Mich. App. 428, 251 N.W.2d 614 (1977).

In action between two secured parties with interest in same collateral, where second secured party filed financing statement before first secured party filed, even though second secured party's interest did not attach until later date, under UCC § 9-312(5), order of filing determined priority, giving second secured party right to foreclose on inventory and equipment of debtor. *Enterprises Now, Inc. v. Citizens & S. Dev. Corp.*, 135 Ga. App. 602, 218 S.E.2d 309 (1975).

Where entruster filed financing statement, incorporating security agreement, one year before other claimant of bankrupt's equipment, entruster's interest had priority over other claimant with respect to office machines entrusted. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where the bankrupt purchaser of a bookbinding machine received possession of it on June 2, when the last of 15 crates containing component parts of the machine were delivered by common carrier to the bankrupt's Maryland plant, the seller's failure to file a financing statement until June 15 permitted the holder of a chattel mortgage containing an after-acquired property clause to obtain the right to possession of the machine. *In re Automated Bookbinding Servs., Inc.*, 471 F.2d 546 (4th Cir. Md. 1972).

Where first secured party did not timely file financing statement until after filing of financing statement by second secured party, second secured party, as first to file, was entitled to priority, although first secured party's security interest was first in

time. *S. Lotman & Son v. Southeastern Fin. Corp.*, 288 Ala. 547, 263 So. 2d 499 (1972).

Actual knowledge on part of secured party of prior interest does not prevent secured party from achieving priority which would have otherwise been obtained by being the first to file. In *re Smith*, 326 F. Supp. 1311 (D. Minn. 1971).

When the purchase money security interest is not perfected by filing within the specified time there is no relation back of the perfection acquired by the subsequent filing. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. Ark. 1969).

A house trailer is a motor vehicle within the meaning of the Uniform Commercial Code provision requiring filing with respect to motor vehicles which are to be licensed or registered in this state, and therefore mortgagee who perfected his security interest by filing the same was entitled to possession of a trailer as opposed to the owner of a retail instalment contract whose filing had expired prior to the mortgagee's perfecting of his security interest. *Albany Dist. Corp. v. Mohawk Nat'l Bank*, 54 Misc. 2d 238 (1967), modified on other grounds, 30 A.D.2d 623, 290 N.Y.S.2d 576 (3d Dep't 1968), on reargument, 30 A.D.2d 919, 292 N.Y.S.2d 300 (3d Dep't 1968), *aff'd*, 28 N.Y.2d 222, 321 N.Y.S.2d 94, 269 N.E.2d 809 (1971).

The Code follows a priority based on order of filing financing statements, when all interests are protected by such filing. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

As to transactions coming within subsection (5)(a) of the instant section, the order of filing determines the order of priorities among conflicting interests in the same collateral, but this result may be varied if one creditor succeeds to the priority of another. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

The order of priority among conflicting interests in the same collateral arising from filing under subsection (5)(a) of the instant section may be varied by the assignment by one creditor of his prior interest to another creditor under § 9-302(2), *supra*, which provides that a

security interest can be "assigned" to another creditor without loss of its priority even if no filing is made. Thus, if the order of priority among three creditors is A, B and C, and A assigns its interest to C, C will acquire A's priority over B. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

11. —Order of perfection.

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1) (c), and (2) since second creditor knew about first creditor's financing statement first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

Supplier of goods on open account, which held perfected security interest in debtor's inventory and accounts, was entitled under UCC § 9-312(1) to prevail in action against second supplier of goods to same debtor for value of goods removed by second supplier from debtor's inventory, where (1) second supplier's security interest in debtor's goods was not perfected, and (2) evidence did not sustain second supplier's contention that first supplier had, under UCC § 9-316, orally subordinated its perfected security interest to second supplier's unperfected security interest. *A-W-D, Inc. v. Salkeld*, 175 Ind. App. 443, 372 N.E.2d 486 (1978).

UCC § 9-312(4) provides the seller under a purchase-money contract with the right to retain his priority if he perfects his security interest before delivery or

within ten days after delivery. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Where instalment seller of cattle did not perfect security interest in livestock by retaining possession of cattle, and did not file financing statement until after bank had filed financing statement listing bank as creditor and instalment buyer as debtor and covering livestock belonging to buyer, bank's security interest in livestock had been perfected prior to security interest of seller. *Walker Bank & Trust Co. v. Burrows*, 29 Utah 2d 218, 507 P.2d 384 (1973).

Possession of mortgaged chattels by mortgagee perfects mortgagee's security interest and in such priority situation perfection of security interest by mortgagee is sufficient to defeat claims by trustee in bankruptcy under § 70(c) of Bankruptcy Act. *August v. Poznanski*, 383 Mich. 151, 174 N.W.2d 807 (1970).

Seller of drilling rig who received chattel mortgage encumbering rig and \$7500 worth of gas drilling pipe and who filed financing statement was not lien creditor of secured party and under Code § 9-312(5)(b) prevailed over prior but unperfected security interest of seller of pipe, notwithstanding that title to pipe had remained in its seller and that rig seller may have had knowledge of pipe seller's prior security interest. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967).

12. Unperfected interests.

Where (1) secured party's loan to debtor was secured by interest in debtor's accounts receivable, (2) after loan was made, debtor sold goods to third party, who was obligated to pay debtor specified sum therefore, (3) debtor owed money to still another third party and entered into arrangement with both third parties whereby money owing to debtor from first third party would be set off against money that debtor owed to second third party, and (4) secured party sought to pierce such arrangement and reach receivables owed to debtor by first third party, court held that in absence of proof that arrangement between debtor and such third parties predated secured transaction between plaintiff and debtor, plaintiff's perfected

security interest prevailed under UCC § 9-312 over the presumably subsequent and unperfected security interest of second third party. *Bank Leumi Trust Co. v. Collins Sales Serv., Inc.*, 65 A.D.2d 735 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 888, 419 N.Y.S.2d 474, 393 N.E.2d 468 (1979).

Historical society's unperfected security interest in station used by debtor railroad was not enforceable against creditor with perfected security interest arising out of recorded mortgage, nor against debtor's trustee in bankruptcy who had status of lien creditor. *In re New Hope & I.R.R.*, 353 F. Supp. 608 (E.D. Pa. 1973).

Enforceable title retention agreement constitutes "purchase money security interest," and where unsigned by debtor, debtor was not entitled to special priority over conflicting security interest in same collateral, since debtor's interest was not perfected. *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970).

13. —Order of attachment.

Where supplier sold truck body kits to debtor, but debtor failed to pay for kits, where bank loaned money to debtor and filed financing statement which listed body kits as collateral, but no separate written security agreement was entered into between bank and debtor, and where body kits were subsequently sold back to supplier and consigned to debtor under agreement giving supplier security interest in kits and supplier filed financing statement covering body kits: (1) bank did not perfect its security interest in collateral by taking "possession" pursuant to UCC § 9-305, prior to time supplier filed its financing statement with secretary of state, although bank's employees were present on debtor's premises during morning of day during which supplier filed, since bank did not begin loading collateral into its truck until sometime after supplier filed; and (2) fact that bank filed and then took possession of collateral did not give bank priority under "first to file" rule of UCC § 9-312(5)(a) since its interest had not attached under UCC § 9-204 prior to time bank took possession and bank could not combine elements of perfecting under filing method with elements under possession method to defeat

rule of UCC § 9-305 that there can be no relation back of perfection date when perfection is obtained through possession. *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. Kan. 1975).

Where neither party has perfected his security interest, UCC § 9-312(5) determines priority between conflicting interests in same collateral; thus, where plaintiff-landlord had lien on tenant's property under terms of recorded lease which was valid under UCC § 9-204(3) but which was not perfected due to plaintiff's failure to file financing statement with secretary of state as required by UCC § 9-401(1)(c), and where defendant sold bar equipment to plaintiff's tenants under conditional sales contract and acquired purchase money security interest under UCC § 9-107(a), which was not perfected under UCC § 9-302(1) since defendant failed to obtain signatures of parties as required by UCC § 9-402(1), and where defendant subsequently repossessed and sold property in question, defendant's security interest took priority over plaintiff's either under theory that defendant perfected its security interest by repossessing and selling property or under theory that defendant's security interest attached prior to plaintiff's. *Engelsma v. Superior Prods. Mfg. Co.*, 298 Minn. 77, 212 N.W.2d 884 (1973).

14. Continuity.

Although description of collateral contained in financing statement was standardized provision covering many irrelevant types of collateral, including "all inventory," phrase "all inventory" was sufficient to give other creditors notice that secured party had perfected security interest in not only inventory possessed by debtor at time of execution of security agreement but also inventory acquired thereafter until debt was paid. Thus, although subsequent creditor acquired purchase money security interest in debtor's inventory, subsequent creditor did not have priority of security interest in such inventory under UCC § 9-312 where prior secured party had prior perfected security interest in same inventory, and where subsequent creditor did not perfect its security interest in compliance with UCC § 9-401(1)(c) by filing financing statement

in office of secretary of state. *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947 (Tex. Civ. App. 1976).

15. Proceeds.

Creditor which had perfected security interest in most of debtor's assets on April 3, 1972, by filing proper financing statements, and which subsequently perfected such security interest in all of debtor's assets on January 28, 1975, by taking possession thereof, had under UCC § 9-301(1) and UCC § 9-312 right to assets superior to right of second creditor which did not acquire interest in assets until April 11, 1975, when it levied execution on judgment against debtor and became lien creditor under UCC § 9-301(3). Thus, or debtor's default, first creditor could sell such assets under UCC § 9-504(1) and retain all proceeds of sale when proceeds did not fully satisfy debt owed to such creditor. *GE Co. v. Hol-Gar Mfg. Corp.*, 431 F. Supp. 881 (E.D. Pa. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. Pa. 1978).

16. Future advances.

Where first creditor in 1968 sold equipment to debtor, sale was financed by purchase money mortgage, and financing statement was filed, where in 1969 second creditor made advance to debtor, took same equipment as collateral and filed financing statement, and where in 1970 first creditor sold additional equipment to debtor, executed new purchase money mortgage and new note which included balance due on all indebtedness, and filed new financing statement, under UCC § 9-312(5)(a) security interest of first creditor with respect to equipment covered by 1968 security agreement took priority over second creditor's security interest notwithstanding first creditor's 1968 security agreement contained no provision to cover future advances as was specifically authorized by UCC § 9-204(5). *Index Store Fixture Co. v. Farmers' Trust Co.*, 536 S.W.2d 902 (Mo. Ct. App. 1976).

In 1963 bank filed financing statement covering future advances; credit company had opportunity to request information from bank before making loan on same collateral; credit company inadvertently did not request such information and thereby permitted itself to be defrauded;

held, bank had priority for various loans advanced between 1963 and 1965 though security agreement was executed with credit company in 1964 and financing statement of credit company was filed in 1964, while no security agreement with bank was executed until 1965. *First Nat'l Bank & Trust Co. v. Atlas Credit Corp.*, 417 F.2d 1081 (10th Cir. Okla. 1969).

17. After-acquired property.

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1)(c), and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978).

Where seller, as supplier of goods on credit, demanded return of goods from buyer within ten days upon discovery of buyer's insolvency pursuant to UCC § 2-702 and where bank had prior perfected security interest in all of buyer's inventory, then owned or thereafter acquired, bank, under definition of UCC § 10201(32,33) qualified as good faith purchaser making it exempt from seller's right to reclaim under UCC § 2-702(3) and bank's perfected security interest had priority over seller as seller failed to perfect its claim by filing as required by UCC § 9-312. *House of Stainless, Inc. v. Marshall & Ilsley Bank*, 75 Wis. 2d 264, 249 N.W.2d 561 (1977).

As to proceeds from sale of slaughtered meat, bankrupt packer's finance agency having prior perfected security interest in

packer's assets, including after-acquired property, had priority over both unpaid cash sellers of cattle and packer's trustee in bankruptcy. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Buyer of business machines was not "debtor" of seller under UCC § 9-105(1) until execution and delivery of security interest agreement where buyer received machines to test usage prior to execution and delivery of agreements, and obtaining of outside financing by buyer was condition precedent to ultimate purchase; thus, financing statements filed within ten days after execution and delivery of purchase money security interest agreements complied with ten-day requirement of UCC § 9-312(4) and were entitled to priority over prior chattel mortgage security agreement containing after-acquired equipment security clause. *In re Ultra Precision Indus., Inc.*, 503 F.2d 414 (9th Cir. Cal. 1974).

Possession under Code § 9-312(4) is not dependent upon completion of tender of delivery terms which affect only buyer and seller of goods; and, since possession of bookbinding machine was received on date when last crate of parts was shipped to buyer, seller's failure to file its financing statement within 10 days of this date, caused it to lose its favored position as purchase moneys secured party, entitling holder of security interest in buyer's after-acquired property to binder. *In re Automated Bookbinding Servs., Inc.*, 471 F.2d 546 (4th Cir. Md. 1972).

Where second secured party had notice of interest held by first secured party in contractor's equipment, but chose to disregard information it had and make loans without checking proper filings, second secured party was not prejudiced by any shortcomings of financing statement filed by first secured party; and first secured party, whose security agreement adequately provided for equipment acquired by contractor after date of signing, had superior claim to proceeds held by receiver. *Aetna Cas. & Sur. Co. v. J.F. Brunken & Son*, 357 F. Supp. 290 (D.S.D. 1973).

The priority of a purchase money security interest over an interest acquired

under an after-acquired property clause is established in Nebraska law by UCC § 9-312(4), as amended. *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

An unrecorded "conditional sales contract note" covering furniture, furnishings and carpeting furnished to a non-profit corporation created only an unperfected security interest, and an encumbrance created by a prior deed of trust containing an after-acquired property provision was superior to the rights created by such note. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

The holder of a chattel mortgage covering after-acquired property who established his security interest by properly filing financing statements takes priority over holder of previously executed conditional sales contract covering the same personal property and fixtures. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

18. Assignee or subrogee.

A vendor, by making an unconditional assignment of his note and deed of trust to a bank, and by filing that assignment in the Chancery Clerk's office conjunctive with an erroneous pay-off figure given by the bank to the closing attorney for a second bank which lent purchasers money secured by the real estate, required that the vendor's deed of trust be subordinated to the second bank's deed of trust. *Cain v. Robinson*, 523 So. 2d 29 (Miss. 1988).

In action to determine priority of security interests of bank and seller of hardware store, where evidence showed that seller's security interest in purchaser's collateral was perfected by filing on July 20, 1972, and that bank's interest in same collateral was perfected by filing on November 2, 1972; that bank, by subordination agreement entered into on July 12, 1972, had subordinated its claim against purchaser to claim of seller; and that on December 11, 1973, rider to subordination agreement executed by bank, seller, and purchaser provided that agreement should apply only to first \$15,000 of purchaser's indebtedness to seller and that priority of claims concerning remainder of such indebtedness should be determined

in accordance with UCC Article 9, (1) provisions of UCC Article 1 applied to case, since subordination agreement and rider related to transactions covered by Uniform Commercial Code and rider specifically referred to Article 9; (2) under UCC § 1-103, dealing with application of supplementary principles of law and equity, non-UCC parol evidence rule applied to case; (3) under UCC § 1-205(4), non-UCC parol evidence rule barred parol evidence by bank that rider was intended to grant bank priority as to claims in excess of first \$15,000 of purchaser's indebtedness to seller, since such evidence was totally inconsistent with unambiguous terms of rider which were controlling; and (4) even if seller's security interest should fail to meet test for special priority under UCC § 9-312(3), seller's interest would still prevail under first-to-file rule of UCC § 9-312(5). *Peoples Bank & Trust v. Reiff*, 256 N.W.2d 336 (N.D. 1977).

Defendant finance company did not acquire security interest in two vehicles superior to that of plaintiff bank, by virtue of automobile dealer's execution and filing of inventory security agreements in favor of the defendant covering vehicles, where vehicles had originally been sold by dealer and conditional sales contracts were assigned to plaintiff subject to recourse contract with dealer, where plaintiff had at all times had possession of certificates of ownership for vehicles and was listed as legal owner thereon, where dealer had possession of vehicles as result of their repossession by plaintiff pursuant to recourse agreement following purchasers' defaults, and where plaintiff had demanded, unsuccessfully, that dealer pay balance due on conditional sales contracts as provided by recourse agreement; under UCC § 9-204, dealer, as debtor, did not acquire rights in subject motor vehicles sufficient to transfer valid security interest to defendant; nor could defendant, by advancing flooring money to dealer be considered buyer in ordinary course of business, but was rather financing agency only, excluded from protection created by UCC § 9-307. *Mother Lode Bank v. GMAC*, 46 Cal. App. 3d 807 (3d Dist. 1975).

Where there are two security interests in the same collateral, and a third person

pays the debt of the debtor to the holder of the prior interest based upon order of filing, the third person, despite the fact that he did not take an assignment of the prior interest would upon principles of subrogation, succeed to the rights of the holding of the prior interest provided that the interest of the intervening lienor was not prejudicially affected. This principle of subrogation is not superseded by the Uniform Commercial Code which provides in § 1-103 that unless displaced by the particular provisions of the Code, the principles of law and equity "shall supplement its provisions" because no provision of the Code purports to affect the fundamental equitable doctrine of subrogation. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

C. Special Rule as to Crops.

19. In general.

In action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached under UCC § 9-204(1) and § 9-204(2)(a) at exactly the same time (when crops were planted), and where, because debtor owed installments to plaintiff within six months of planting his crops, defendant's security interest was not entitled to priority under UCC § 9-312(2) over plaintiff's security interest, plaintiff's security interest, which was perfected by filing of financial statement before defendant perfected his security interest by filing such a statement, was entitled under UCC § 9-312(5)(a) to priority over security interest of defendant. *United States v. Minster Farmers Coop. Exch., Inc.*, 430 F. Supp. 566 (N.D. Ohio 1977).

D. Inventory-Secured Purchase Money Security Interests.

20. In general.

In junior mortgagee's action for damages for defendant's alleged impairment of plaintiff's security, where defendant under security agreement with dealer in modular homes had security interest in all of dealer's present or future inventory and also first mortgage on 2.39 acres of land acquired by dealer for use as sales lot, on

which dealer installed two modular homes; where plaintiff held second mortgage on dealer's 2.39 acres as security for loan on which dealer defaulted; and where defendant after dealer's default quickly removed modular homes from dealer's lot pursuant to written authorization from officer of dealer's company, (1) homes placed by dealer on sales lot, although installed on concrete foundations and connected to utilities, were inventory and not real property or fixtures under UCC § 9-109(4), since they were goods intended for immediate or ultimate sale; (2) defendant held perfected purchase-money security interest in dealer's inventory under UCC § 9-401(1)(c) and UCC § 9-402(1), which under UCC § 9-312(3) took priority over plaintiff's junior-mortgage interest; and (3) defendant on dealer's default had right to take possession of homes on dealer's lot, since they were inventory collateral. *Rakosi v. GECC*, 59 A.D.2d 553 (2d Dep't 1977).

UCC § 9-312(3) provides a purchase-money lender with a means of obtaining priority for its purchase-money security interest over the previously perfected security interest of another creditor in the same items or types of inventory that are covered by the purchase-money lender's security interest. *Sears, Roebuck & Co. v. Detroit Fed. Sav. & Loan Ass'n*, 79 Mich. App. 378, 262 N.W.2d 831 (1977).

21. Time of perfection.

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale

account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Secured party who was first to file finance statement covering same inventory included in financing statement subsequently filed by bank had priority over bank, notwithstanding subsequent conduct of secured party. *Borg-Warner Acceptance Corp. v. First Nat'l Bank*, 307 Minn. 20, 238 N.W.2d 612 (1976).

In order for a purchase money security interest in inventory collateral to have priority over a conflicting security interest in the same collateral the one holding the purchase money security interest must have perfected it at the time the debtor receives possession of the collateral, and, in addition, before the debtor receives possession of the collateral, the holder of the purchase money security interest must notify in proper form any secured party whose interest is known to the holder or who has a financing statement on file. *Manufacturers Acceptance Corp. v.*

Penning's Sales, Inc., 5 Wash. App. 501, 487 P.2d 1053 (1971).

22. Notice.

The notice requirement of UCC § 9-312(3)(b) and (c) is satisfied by description of collateral as "air conditioners" without listing of serial numbers, and by single notification letter, not repeated each time inventory goods were shipped to a dealer. *Fedders Fin. Corp. v. Chiarelli Bros.*, 221 Pa. Super. 224, 289 A.2d 169 (1972).

23. —Timeliness.

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before

security agreement is made or security interest otherwise attaches, which is what had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Under oral agreement for sale of standing timber, seller's purchase money security interest became effective when buyer entered on land and served timber; but this purchase money security interest could only have had priority over other secured party's security interest in buyer's inventory if seller had notified other secured party, which had duly filed financing statement, of her security interest before buyer cut timber and lumber. *Barry v. Bank of N.H.*, 112 N.H. 226, 293 A.2d 755 (1972).

24. —Sufficiency.

Although description of collateral contained in financing statement was standardized provision covering many irrelevant types of collateral, including "all inventory," phrase "all inventory" was sufficient to give other creditors notice that secured party had perfected security interest in not only inventory possessed by debtor at time of execution of security agreement but also inventory acquired thereafter until debt was paid. Thus, although subsequent creditor acquired purchase money security interest in debtor's inventory, subsequent creditor did not have priority of security interest in such inventory under UCC § 9-312 where prior secured party had prior perfected security interest in same inventory, and where subsequent creditor did not perfect its security interest in compliance with UCC § 9-401(1)(c) by filing financing statement in office of secretary of state. *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947 (Tex. Civ. App. 1976).

There is no UCC provision requiring that a purchase money security holder provide separate notification to other secured party each time goods are shipped to a debtor; indeed, notification that purchase money security holder "has or ex-

pects to acquire, purchase money security interest in certain inventory of [debtor]..." would cover after-acquired inventory reasonably identified in notification letter, and no additional notification should be required to satisfy UCC § 9-312(3)(b) and (c). *Fedders Fin. Corp. v. Chiarelli Bros.*, 221 Pa. Super. 224, 289 A.2d 169 (1972).

Direct specification of "air conditioners" without specifying serial numbers is sufficient identification of inventory involved in purchase money security interest holder's notification letter to other secured party in compliance with UCC § 9-312(3)(b)(c). *Fedders Fin. Corp. v. Chiarelli Bros.*, 221 Pa. Super. 224, 289 A.2d 169 (1972).

25. After-acquired property.

Where manufacturing company, which had been making gun cabinets for another company under contract providing that such other company would furnish basic materials for cabinets, that it reserved title to such materials, and that it would buy assembled cabinets from manufacturer at reduced price, became insolvent and ceased operations after obtaining Small Business Administration loan from two banks that required manufacturer to execute security agreement in their favor in manufacturer's present and after-acquired inventory, and where such banks, after perfecting their security interests in such inventory by filing financial statements that were proper in form, content, and place of filing, attempted to enforce such security interests by taking possession of manufacturer's inventory, as against asserted interest therein of company supplying materials to manufacturer, (1) interest of supplier of materials was purchase-money security interest under UCC § 9-107(b); (2) such interest was not perfected under UCC § 9-304 by filing of financing statement concerning such materials and giving notice of claim thereto; and (3) under UCC § 9-312(3), such unperfected interest had no priority over perfected security interests of banks in such materials (which were part of manufacturer's inventory), where security interests of banks had properly attached under UCC § 9-204(1). *Morton Booth Co.*

v. Tiara Furn., Inc., 564 P.2d 210 (Okla. 1977).

A lien in after-acquired inventory items created by a security agreement under § 9-204(3), if filing requirements are complied with, may be superior to a subsequently acquired contract creditor's lien or other third party claim except those of buyers in ordinary course of business under § 9-307(1) and holders of perfected purchase money security interest under § 9-312(3). *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967).

The rights of a wholesaler who sold two automobiles to a dealer on credit but failed to retain a valid purchase money security interest are subordinate to those of a finance company which had previously perfected its security interest in the dealer's entire present and future inventory of vehicles. *McDonald v. Peoples Auto. Loan & Fin. Corp. of Athens, Inc.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967).

Where a security agreement gave the lender a security interest in the borrower's inventory, including all raw materials, work in progress, finished goods, and all similar goods thereafter acquired including their product and proceeds, the lender's security interest attached not only to raw materials sold to the borrower by a supplier who failed to retain and perfect a purchase-money security interest therein, but the lender's interest also attached to the borrower's finished products which supplier had received in payment; and the lender's rights could not be defeated by application of the equitable doctrine of unjust enrichment. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

A properly recorded bill of sale to secure debt on an inventory, with clauses covering future advances and acquisition of substitute and additional inventory, executed and recorded prior to the adoption of the UCC, does not have to be filed anew under the UCC to preserve its security interest in inventory acquired by the debtor after the effective date of the UCC, and the trial court did not err in ordering the proceeds of the sale of such inventory paid to the holder of the bill of sale to secure debt rather than to holders of security interests, which were not purchase

money interests, executed and delivered with filings made thereon after the effective date of the UCC. *Charles S. Martin Distrib. Co. v. First State Bank*, 114 Ga. App. 693, 152 S.E.2d 599 (1966).

E. Non-Inventory Secured Purchase Money Security Interests.

26. In general.

The bankrupt purchaser of a bookbinding machine received possession of it on the date the last of the 15 crates containing component parts of the machine were delivered to the bankrupt's Maryland plant by common carrier. The date of final installation and completion of tender of delivery terms is irrelevant as to when possession occurs under the code. In *re Automated Bookbinding Servs., Inc.*, 471 F.2d 546 (4th Cir. Md. 1972).

Where lessor leased breeder stock to bankrupt with all progeny to be property of bankrupt and with first lien on progeny being granted under lease to lessor, this lien could not be equated with purchase money security interest, since element of acquiring rights in or use of collateral within meaning of UCC was missing; and lessor acquired nothing more than security interest under lease and was in same position as other suppliers to bankrupt who made swine production operation possible. *Ingram v. Ozark Prod. Credit Ass'n*, 468 F.2d 564 (5th Cir. Ala. 1972).

Upon delivery of collateral to debtor under oral contract for sale, seller retains only purchase money security interest in collateral; and, absent perfection of purchase money security interest, seller's rights in collateral or proceeds thereof are subordinated to rights of other secured party having prior perfected security interest, regardless of whether seller, by explicit agreement, retained title to goods. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972), reh'g denied, 153 Ind. App. 89, 287 N.E.2d 788 (1972).

27. Notice.

Holder of purchase money security interest in noninventory collateral does not need to follow notice procedures required of holders of purchase money security interest in inventory collateral. *Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316 (9th Cir. Alaska 1970).

28. Time of perfection.

In an action by a seller of air conditioning equipment against a bank which held a perfected security interest on all after-acquired property belonging to the bankrupt purchaser of the air conditioning equipment, the trial court erred in granting possession of the air conditioning units to the seller where the security agreement held by the bank specifically included after-acquired property, including air conditioning units, and such security agreement had been perfected by being filed with the chancery clerk's office and in the office of the secretary of state of the State of Mississippi four months prior to the sale of the units to the purchaser; nor did the seller attain the status of a purchase money secured party where the conditional sales contracts covering the air conditioning units had not been filed until more than a year after the sale was completed, thereby ignoring the requirements of § 75-9-312(4) requiring perfection of the security interest at the time the debtor received possession of the collateral or within ten days. *Peoples Bank & Trust Co. v. Comfort Eng'g Co.*, 408 So. 2d 1190 (Miss. 1982).

UCC § 9-312(4) provides the seller under a purchase-money contract with the right to retain his priority if he perfects his security interest before delivery or within ten days after delivery. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978).

Buyer of business machines was not "debtor" of seller under UCC § 9-105(1) until execution and delivery of security interest agreement where buyer received machines to test usage prior to execution and delivery of agreements, and where obtaining of outside financing by buyer was condition precedent to ultimate purchase; thus, financing statements filed within ten days after execution and delivery of purchase money security interest agreements complied with ten-day requirement of UCC § 9-312(4) and were entitled to priority over prior chattel mortgage security agreement containing after-acquired equipment security clause. *In re Ultra Precision Indus., Inc.*, 503 F.2d 414 (9th Cir. Cal. 1974).

Secured party acquired "purchase money security interest" in skidder (a piece of logging equipment), which was properly classified by trial court as "collateral other than inventory" within UCC § 9-109, and perfected this interest within 10 days of date that debtor received possession of collateral, so that holder of purchaser money security interest had priority over other conflicting security interest as to collateral under UCC § 9-312(4). *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972).

Perfected purchase money security interest in automobile, not sold in ordinary course of business and therefore not inventory, has priority over seller's later perfected security interest both from standpoint of filing time and under Code § 9-312(4). *National Bank of Commerce v. First Nat'l Bank & Trust Co.*, 446 P.2d 277, 30 A.L.R.3d 1 (Okla. 1968).

As to the conditional sale of a cash register to a restaurant owner, it was said that the conditional seller could have completely protected himself under subsection (4) of the instant section by perfecting his interest before or within ten days of the delivery of the cash register. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

29. Type of collateral.

Even if financing statement covering lumber had not been "duly" filed by bank, bank's security interest, which was perfected at very latest upon its taking possession of lumber, would still be superior to plaintiff's purchase money security interest in lumber, which had never been perfected by filing or otherwise. *Barry v. Bank of N.H.*, 113 N.H. 158, 304 A.2d 879 (1973).

30. —Equipment.

In determining priorities under Article 9, since defendant failed to file a financing statement at the time the debtor received possession of the equipment or within 10 days thereafter, plaintiff had priority over defendant as to the equipment described in the lease agreement between defendant and debtor. *James Talcott, Inc. v. Franklin*

Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972).

31. —Consumer goods.

Failure of seller of appliances and carpeting, purchased by debtor for installation in debtor's condominium apartment project, (1) to perfect its purchase-money security interest in such goods before delivery of goods to debtor, and (2) seller's failure to notify bank, which held valid, previously perfected security interest in all appliances, carpeting, drapes, and similar goods that might come into debtor's possession for use in such condominium project, of seller's purchase-money security interest in goods sold to debtor before debtor received possession of goods, was fatal under UCC § 9-312(3) and § 9-312(5)(a) to seller's claim that its purchase-money security interest in goods sold had priority over bank's perfected security interest in such goods. *Sears, Roebuck & Co. v. Detroit Fed. Sav. & Loan Ass'n*, 79 Mich. App. 378, 262 N.W.2d 831 (1977).

32. After-acquired property.

In an action by a seller of air conditioning equipment against a bank which held a perfected security interest on all after-acquired property belonging to the bankrupt purchaser of the air conditioning equipment, the trial court erred in granting possession of the air conditioning units to the seller where the security agreement held by the bank specifically included after-acquired property, including air conditioning units, and such security agreement had been perfected by being filed with the chancery clerk's office and in the office of the secretary of state of the State of Mississippi four months prior to the sale of the units to the purchaser; nor did the seller attain the status of a purchase money secured party where the conditional sales contracts covering the air conditioning units had not been filed until more than a year after the sale was completed, thereby ignoring the requirements of § 75-9-312(4) requiring perfection of the security interest at the time the debtor received possession of the collateral or within ten days. *Peoples Bank & Trust Co. v. Comfort Eng'g Co.*, 408 So. 2d 1190 (Miss. 1982).

In dispute over proceeds of tractors subject to both "after-acquired property" clause under UCC § 9-204(3) and purchase money security interest, purchase money security interest was subordinated to other security interest where, under UCC § 9-312(4), debtor possessed equipment for more than 10 days prior to filing of financing statement. *James Talcott, Inc. v. Associates Capital Co.*, 70 Ohio Op. 2d 295, 491 F.2d 879 (6th Cir. Ohio 1974).

33. Priority as to lien creditors.

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent authority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. *K Furn. Co. v. Sanders Transf. & Storage Co.*, 532 S.W.2d 910 (Tenn. 1975).

Filing of lease with county clerk and proper recordation in county deed book does not effectuate perfected security interest where filing party did not direct the clerk to record the lease as a filing statement when the filing fee was paid. It is implicit in the Kentucky statutory scheme that if a party intends a single document to serve multiple purposes and where each purpose requires recording to effectuate its validity, duplicate instruments must be supplied and the clerk must be informed as to the purpose for which each is to be recorded. *In re Leckie Freeburn Coal Co.*, 405 F.2d 1043 (6th Cir. Ky. 1969), cert. denied, 395 U.S. 960, 89 S. Ct. 2101, 23 L. Ed. 2d 746 (1969).

Carpeting furnished to a non-profit corporation was capable of being construed as a fixture, and an unrecorded "conditional sales contract note" covering the carpeting was insufficient to create a security interest which would take priority over an encumbrance created by a prior deed of trust containing an after-acquired property provision. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

A seller of automobile tires on a conditional sale, could not assert his interest against a third person, when the seller had failed to file notice of his security interest. *Ludlow Rubber Co. v. Mack Truck Sales, Inc.*, 38 Mass. App. Dec. 78 (1967).

F. Decisions Under Former Statutes.

34. In general.

Where an automobile dealer and a finance company choose to do business under the method provided by the Uniform Trust Receipts Act, the finance company cannot assert that it has a purchase money lien under Code 1942, § 337 which is prior to any lien created by the levy of execution by a judgment creditor. *Murdock Acceptance Corp. v. Woodham*, 208 So. 2d 56 (Miss. 1968).

Where personal property had been seized by the sheriff in satisfaction of enrolled judgment liens of the state tax commission and placed in the lawful possession of the sheriff to satisfy the tax lien judgments, the purchase money lien of the seller of part of the seized property ceased to exist when possession of the property was transferred from the original purchaser to the sheriff who had no notice of the existence of the statutory vendor's lien. *Paper Prods. Co. v. Mississippi State Tax Comm'n*, 206 So. 2d 635 (Miss. 1968).

The legislature did not intend by the enactment of Code 1942, § 851, to subordinate the vendor's lien created by Code 1942, § 337, to the lien of a prior chattel mortgage on after acquired property executed under the authority of Code 1942, § 851, and thereby permit the holder of such prior chattel mortgage to take property that had not been paid for, while still in the hands of the first purchaser, and appropriate it to the payment of the chattel mortgage indebtedness and thereby defeat the vendor's purchase money lien.

Trenton Lumber Co. v. Boling, 230 Miss. 233, 92 So. 2d 440 (1957).

Where the holder of a mortgage deed of trust, covering after acquired property of the purchaser, was charged with notice of the general custom of the lumber trade that planing mill operators, such as the purchaser, paid for rough lumber delivered at the mill by small operators at the end of the week rather than at the time of delivery, it was not in position to claim lack of notice that certain lumber delivered to purchaser by the vendors had not been paid for, and that it had a right to take the lumber and apply it to purchaser's indebtedness without making payment therefor, since the vendors had not lost their purchase money liens. *Trenton Lumber Co. v. Boling*, 230 Miss. 233, 92 So. 2d 440 (1957).

Since the purchasers' employees had performed no service in the production of the rough lumber, the employees liens were inferior to the vendors' purchase money liens. *Trenton Lumber Co. v. Boling*, 230 Miss. 233, 92 So. 2d 440 (1957).

One who claims his mechanic's lien on motor truck for its repair is superior to lien retained for unpaid purchase price has burden of establishing that labor and materials furnished constitute repairs, as distinguished from articles purchased for truck or fuel to enable it to operate, and that such repairs were reasonably necessary to preserve truck and permit its ordinary operation and prevent deterioration. *Funchess v. Pennington*, 205 Miss. 500, 39 So. 2d 1 (1949).

A garageman surrendering possession of a repaired truck to its owner did not thereby lose his lien as against the holder of a deed of trust embracing the truck where there had been no breach of condition or foreclosure of the deed of trust. *Watson v. Broadhead*, 203 Miss. 142, 33 So. 2d 302 (1948).

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ALR. Automobiles: priorities as between vendor's lien and subsequent title or security interest obtained in another

state to which vehicle has been removed. 42 A.L.R.3d 1168.

Equitable estoppel of secured party's

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Priorities of security interests; among conflicting interests in same collateral, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:391-9:396.

Priorities among conflicting security interests in the same collateral, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3531 et seq.

CJS. 79 C.J.S., Secured Transactions §§ 102-106.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 75-9-323. Future advances.

(a) Except as otherwise provided in subsection (c), for purposes of determining the priority of a perfected security interest under Section 75-9-322(a)(1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) Is made while the security interest is perfected only:

(A) Under Section 75-9-309 when it attaches; or

(B) Temporarily under Section 75-9-312(e), (f), or (g); and

(2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under Section 75-9-309 or 75-9-312(e), (f), or (g).

(b) Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than forty-five (45) days after the person becomes a lien creditor unless the advance is made:

(1) Without knowledge of the lien; or

(2) Pursuant to a commitment entered into without knowledge of the lien.

(c) Subsections (a) and (b) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Except as otherwise provided in subsection (e), a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the buyer's purchase; or

(2) Forty-five (45) days after the purchase.

(e) Subsection (d) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the forty-five-day period.

(f) Except as otherwise provided in subsection (g), a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the lease; or

(2) Forty-five (45) days after the lease contract becomes enforceable.

(g) Subsection (f) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the forty-five-day period.

SOURCES: Derived from former 1972 Code §§ 75-9-301 [Codes, 1942, § 41A:9-301; Laws, 1966, ch. 316, § 9-301; Laws, 1977, ch. 452, § 14; Laws, 1986, ch. 343, § 1; Laws, 1996, ch. 468, § 62, eff from and after July 1, 1996], 75-9-307 [Codes, 1942, § 41A:9-307; Laws, 1966, ch. 316, § 9-307; Laws, 1977, ch. 452, § 19; Laws, 1986, ch. 482, § 1, eff from and after December 24, 1986 (the date Section 1324 of the Food Security Act of 1985 became effective)], and 75-9-312 [Codes, 1942, § 41A:9-312; Laws, 1966, ch. 316, § 9-312; Laws, 1977, ch. 452, § 21; Laws, 1986, ch. 343, § 2; Laws, 1990, ch. 384, § 54; Laws, 1996, ch. 468, § 69, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-324. Priority of purchase-money security interests.

(a) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in Section 75-9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within twenty (20) days thereafter.

(b) Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 75-9-330, and, except as otherwise provided in Section 75-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within five (5) years before the debtor receives possession of the inventory; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Subsections (b)(2) through (4) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under Section 75-9-312(f), before the beginning of the twenty-day period thereunder.

(d) Subject to subsection (e) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in Section 75-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the livestock;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within six (6) months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Subsections (d)(2) through (4) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under Section 75-9-312(f), before the beginning of the twenty-day period thereunder.

(f) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in Section 75-9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) If more than one (1) security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f):

(1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) In all other cases, Section 75-9-322(a) applies to the qualifying security interests.

SOURCES: Derived from former 1972 Code § 75-9-312 [Codes, 1942, § 41A:9-312; Laws, 1966, ch. 316, § 9-312; Laws, 1977, ch. 452, § 21; Laws, 1986, ch. 343, § 2; Laws, 1990, ch. 384, § 54; Laws, 1996, ch. 468, § 69, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Purchase-money security interest, see § 75-9-103.
Scope of Article, see § 75-9-109.

§ 75-9-324A. Priority of production-money security interests and agricultural liens.

(a) Except as otherwise provided in subsections (c), (d), and (e), if the requirements of subsection (b) are satisfied, a perfected production-money security interest in production-money crops has priority over a conflicting security interest in the same crops and, except as otherwise provided in Section 75-9-327, also has priority in their identifiable proceeds.

(b) A production-money security interest has priority under subsection (a) if:

(1) The production-money security interest is perfected by filing when the production-money secured party first gives new value to enable the debtor to produce the crops;

(2) The production-money secured party sends an authenticated notification to the holder of the conflicting security interest not less than ten (10) or more than thirty (30) days before the production-money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party; and

(3) The notification states that the production-money secured party has or expects to acquire a production-money security interest in the debtor's crops and provides a description of the crops.

(c) Except as otherwise provided in subsection (d) or (e), if more than one (1) security interest qualifies for priority in the same collateral under subsection (a), the security interests rank according to priority in time of filing under Section 75-9-322(a).

(d) To the extent that a person holding a perfected security interest in production-money crops that are the subject of a production-money security interest gives new value to enable the debtor to produce the production-money crops and the value is in fact used for the production of the production-money crops, the security interests rank according to priority in time of filing under Section 75-9-322(a).

(e) To the extent that a person holds both an agricultural lien and a production-money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — Production-money security interest, see § 75-9-103.

§ 75-9-325. Priority of security interests in transferred collateral.

(a) Except as otherwise provided in subsection (b), a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) The debtor acquired the collateral subject to the security interest created by the other person;

(2) The security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) There is no period thereafter when the security interest is unperfected.

(b) Subsection (a) subordinates a security interest only if the security interest:

(1) Otherwise would have priority solely under Section 75-9-322(a) or 75-9-324; or

(2) Arose solely under Section 75-2-711(3) or 75-2A-508(5).

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-326. Priority of security interests created by new debtor.

(a) Subject to subsection (b), a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under Section 75-9-508 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under Section 75-9-508.

(b) The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under Section 75-9-508. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-327. Priority of security interests in deposit account.

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under Section 75-9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control under Section 75-9-314 rank according to priority in time of obtaining control.

(3) Except as otherwise provided in paragraph (4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under Section 75-9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

SOURCES: Derived from former 1972 Code § 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-328. Priority of security interests in investment property.

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under Section 75-9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security interests held by secured parties each of which has control under Section 75-9-106 rank according to priority in time of:

(A) If the collateral is a security, obtaining control;

(B) If the collateral is a security entitlement carried in a securities account and:

(i) If the secured party obtained control under Section 75-8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) If the secured party obtained control under Section 75-8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) If the secured party obtained control through another person under Section 75-8-106(d)(3), the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in Section 75-9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under Section 75-9-313(a) and not by control under Section 75-9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under Section 75-9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by Sections 75-9-322 and 75-9-323.

SOURCES: Derived from former 1972 Code § 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-329. Priority of security interests in letter-of-credit right.

The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) A security interest held by a secured party having control of the letter-of-credit right under Section 75-9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under Section 75-9-314 rank according to priority in time of obtaining control.

SOURCES: Derived from former 1972 Code § 75-9-115 [Laws, 1996, ch. 468, § 59, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-330. Priority of purchaser of chattel paper or instrument.

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 75-9-105; and

(2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 75-9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Except as otherwise provided in Section 75-9-327, a purchaser having priority in chattel paper under subsection (a) or (b) also has priority in proceeds of the chattel paper to the extent that:

(1) Section 75-9-322 provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Except as otherwise provided in Section 75-9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) For purposes of subsections (a) and (b), the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) For purposes of subsections (b) and (d), if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

SOURCES: Derived from former 1972 Code § 75-9-308 [Codes, 1942, § 41A:9-308; Laws, 1966, ch. 316, § 9-308; Laws, 1977, ch. 452, § 20, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Rights of holder of commercial paper, see §§ 75-3-301 et seq. Rights and title resulting from transfer of negotiable documents of title, see §§ 75-7-502 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-308.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-308.

6. In general.

Where finance company entered into agreement with mobile home dealer under which finance company agreed to finance dealer's inventory of mobile homes, where dealer delivered to finance company certain manufacturer's certificates of origin on mobile homes to secure re-payment of loans, and gave finance company security interest in vehicles by way of security agreement between parties, where four mobile homes were sold by dealer in regular course of his business to certain individuals on security agreement contracts, which were then sold and assigned to bank in ordinary course of its business, but where dealer did not use these funds

to pay off its outstanding loans owed to finance company, bank's security interest in four mobile homes took priority over finance company's interest therein, notwithstanding bank had knowledge of security interest claimed by finance company; under UCC § 9-308, bank was purchaser of chattel paper, it gave "new value" for four security agreements it purchased from dealer, bank purchased security agreements in ordinary course of its business, and security interest claimed by finance company was claimed "merely as proceeds of inventory subject to a security interest." *Rex Fin. Corp. v. Great W. Bank & Trust*, 23 Ariz. App. 286, 532 P.2d 558 (1975).

Under UCC § 9-308, where a purchaser of chattel paper gives new value and takes possession of it in the ordinary course of his business he has priority over a security interest in the chattel paper which is claimed as proceeds of inventory, and this is true even though the purchaser knows that the specific paper is subject to a security interest in favor of an inventory secured party. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 541, 473 S.W.2d 876 (1971).

A bank which had previously noted its security interest on the DX title to an automobile which was sold by a dealer in the ordinary course of business lost its security interest in the chattel paper which represented part of the proceeds of the automobile's sale when, in conformity

with this section, the dealer sold the chattel paper to a discounter; and the bank's interest thereupon shifted to the proceeds of the sale of the paper received by the dealer. *Associates Disct. Corp. v. Old Freeport Bank*, 421 Pa. 609, 220 A.2d 621 (1966).

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts. 10 A.L.R.2d 447.

Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 8.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 10 et seq., 34.

11 Am. Jur. 2d, Bills and Notes §§ 260, 300.

68A Am. Jur. 2d, Secured Transactions §§ 926 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:491-9:493 (priorities and protection of purchasers; chattel paper and instruments).

CJS. 6A C.J.S., Assignments §§ 74 et seq.

10 C.J.S., Bills and Notes §§ 127, 128.

§ 75-9-331. Priority of rights of purchasers of instruments, documents, and securities under other articles; priority of interests in financial assets and security entitlements under Article 8.

(a) This article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7 and 8.

(b) This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8.

(c) Filing under this article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b).

SOURCES: Derived from former 1972 Code § 75-9-309 [Codes, 1942, § 41A:9-309; Laws, 1966, ch. 316, § 9-309; Laws, 1990, ch. 384, § 53; Laws, 1996, ch. 468, § 68, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Commercial paper, see §§ 75-3-101 et seq.

Documents of title, see §§ 75-7-101 et seq.

Investment securities, see §§ 75-8-101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-309.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-309.

6. In general.

Where, after bank perfected security interest in company's accounts and their proceeds, company induced debtor to pay his account by giving promissory note for amount owed, and negotiated this note to defendant, defendant did not have actual

notice of bank's security interest, was holder in due course, and had priority with respect to note and cash payment over bank's earlier perfected security interest. *Citizens Valley Bank v. Pacific Materials Co.*, 263 Or. 557, 503 P.2d 491 (1972).

A purchaser who has paid a factor for the seller (which factor has a security interest in the invoice) has no claim against the factor for the seller's default; he can look to the seller only. Nor can a claim against a factor be based on payment due to a mistake if the alleged mistake is that the buyer believed the seller would perform or had performed. *Crompton-Richmond Co. v. Raylon Fabrics, Inc.*, 33 A.D.2d 741 (1st Dep't 1969).

RESEARCH REFERENCES

ALR. Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 8.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 427-429, 431-433.

13 Am. Jur. 2d, Carriers §§ 365, 366.

18 Am. Jur. 2d, Corporations §§ 21, 681 et seq.

68A Am. Jur. 2d, Secured Transactions § 930.

78 Am. Jur. 2d, Warehouses §§ 49 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:501, 9:502 (priorities and protection of purchasers; instruments and documents).

CJS. 10 C.J.S., Bills and Notes §§ 127, 128, 169, 170, 175, 184, 189.

13 C.J.S., Carriers §§ 398-401.

18 C.J.S., Corporations §§ 217 et seq.

93 C.J.S., Warehousemen and Safe Depositaries §§ 41-49.

§ 75-9-332. Transfer of money; transfer of funds from deposit account.

(a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-333. Priority of certain liens arising by operation of law.

(a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) Which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) Which is created by statute or rule of law in favor of the person; and

(3) Whose effectiveness depends on the person's possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

SOURCES: Derived from former 1972 Code § 75-9-310 [Codes, 1942, § 41A:9-310; Laws, 1966, ch. 316, § 9-310, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Right of innocent secured party upon forfeiture of encumbered conveyance for unlawful possession of alcoholic beverages, see § 67-1-17.

Scope of this chapter, see § 75-9-109.

Statutory liens, generally, see §§ 85-7-1 et seq.

Landlord's lien, see §§ 89-7-51, 89-7-53.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-310.

6. In general.
7. Construction with other laws.
8. —Federal law.
9. —Pre-code law.
10. Ordinary course of business.
11. Enhancement or preservation.
12. Possession.
13. Consent or lack thereof.
14. Common law liens.
15. Statutory liens.
16. Express exceptions.
17. Particular liens prior.
18. —Builders or the like.
19. —Garagemen or the like.
20. Particular liens subject.
21. Remedies in satisfaction of liens.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-310.

6. In general.

It seems highly questionable that a landlord's lien may come within this section as a lien for "services or materials" in the light of the distinction drawn between

such liens and that of a landlord in § 9-104, and the further fact that leasing of the premises does not enhance or preserve the value of the collateral situated thereon. In re Einhorn Bros., 171 F. Supp. 655 (E.D. Pa. 1959), aff'd, 272 F.2d 434 (3d Cir. Pa. 1959).

7. Construction with other laws.

Observing that the only construction of this section that makes it compatible with the Ohio certificate of title law would be one which considers that the first use in this section of the word "lien" refers to the claim of the laborer or materialman in possession, and that the second use of the word "lien" therein refers to the claim of the secured interest, the court held that inasmuch as the title law gave priority to a properly noted security interest such an interest takes precedence over an artisan's lien. Commonwealth Loan Co. v. Downtown Lincoln Mercury Co., 4 Ohio App. 2d 4, 211 N.E.2d 57 (1964).

8. —Federal law.

In action between bank which held prior federally recorded security interest in airplane and bailee which held possessory lien for storage charges, under UCC §§ 9-104(c) and 9-310, possessory lien had priority over bank's interest. Industrial Nat'l

Bank v. Butler Aviation Int'l, Inc., 370 F. Supp. 1012 (E.D.N.Y. 1974).

As security interests in aircraft are not subject to Article 9, the provisions of UCC § 9-310 do not confer any priority to the lien of a repairman over a federally-recorded security interest in the aircraft. *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (Ch. Div. 1968).

9. —Pre-code law.

Colorado version of Code § 9-310 (differing from “official” or “uniform” law) provides that repairman’s lien does not take priority over perfected security interest, such as prior recorded chattel mortgage, thereby retaining pre-Code order of priorities. *First Sec. Bank v. Crouse*, 374 F.2d 17 (10th Cir. Colo. 1967).

Chattel mortgages on a tractor which were executed and recorded prior to the effective date of the UCC, at a time when by statute such security interests had priority over mechanic’s liens, were held to have priority over a mechanic’s lien for services performed after the effective date of the act, for to hold otherwise would violate constitutional provisions prohibiting the passage of any law impairing the obligations of contract. *First Nat’l Bank v. Bahan*, 26 Ohio Op. 2d 429, 198 N.E.2d 272 (1964).

10. Ordinary course of business.

Person who furnishes materials or service with respect to goods that are already subject to perfected security interest is not engaged in ordinary course of his business under Code § 9-310 with respect to any part of his charges that is unreasonable. *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973).

Garageman’s lien for auto storage charges takes priority over finance company’s perfected security interest, where there was no showing that lien was lien on goods for services performed in ordinary course of business. *Charlie Eidson’s Paint & Body Shop, Inc. v. Commercial Credit Plan, Inc.*, 146 Ind. App. 209, 253 N.E.2d 717 (1969).

11. Enhancement or preservation.

Under Code § 9-310, claims arising from work intended to enhance or preserve value of collateral take priority over

earlier perfected security interest even though artisan’s services or materials were furnished without knowledge or approval of secured parts. *Manufacturers Acceptance Corp. v. Gibson*, 220 Tenn. 654, 422 S.W.2d 435 (1967).

Repairman who enhanced value of bulldozer by labor and materials had common-law artisan’s lien on bulldozer and, under Code § 9-310, priority over prior perfected security interest of seller of bulldozer. *Ferrante Equip. Co. v. Foley Mach. Co.*, 49 N.J. 432, 231 A.2d 208 (1967).

Under Code § 9-310, mechanic’s lien of automobile repair shop had lien priority over security interest of bank which had financed purchase of automobile, even though work performed by repair shop did not enhance value of automobile. *Philadelphia Nat’l Bank v. Keough*, 55 Del. C. R. 88 (Pa. 1967).

12. Possession.

Where (1) plaintiff Farmers Home Administration (FHA) perfected security interest in debtor’s tractor on February 2, 1972, (2) defendant mechanic performed repairs totalling \$1,607.47 on such tractor on six occasions between December 29, 1972 and December 21, 1973, returning tractor to debtor’s possession after each repair job was completed, and (3) defendant, after performing seventh repair job amounting to \$543.81, retained possession of tractor on debtor’s failure to pay accumulated repair bill, defendant under UCC § 9-310 had lien on tractor that took priority over plaintiff’s perfected security interest therein to extent of amount (\$543.81) owed for seventh repair job. However, defendant’s lien did not have priority over plaintiff’s security interest insofar as first six repair jobs were concerned, since defendant did not retain continuous actual or constructive possession of tractor after such jobs were completed but returned it to debtor on each occasion. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), on remand, 600 F.2d 478 (5th Cir. Ga. 1979).

Under UCC § 9-310 and mechanic’s lien statute providing that if lienholder parts with possession of repaired property, lienholder retains lien while property is in hands of owner or one deriving title or

possession through owner with notice that repair bill is unpaid, lien of repairman who was in possession of crawler-tractor on which he had made repairs had priority over prior perfected security interest of owner-lessor of tractor. *Thorp Com. Corp. v. Mississippi Rd. Supply Co.*, 348 So. 2d 1016 (Miss. 1977).

Uniform Commercial Code is totally inapplicable to nonpossessory liens and question of their priority in relation to secured interests must be determined by existing statutes and pre-code case law. *Leger Mill Co. v. Kleen-Leen, Inc.*, 563 P.2d 132 (Okla. 1977).

Automobile repairmen did not lose their possessory lien when owner of automobile took car from their possession without their consent. *Finch v. Miller*, 271 Or. 271, 531 P.2d 892 (1975).

Garageman who acquires valid lien for towing, repairing and storing automobile has priority over previously perfected security interest while automobile is in possession of garageman, under Code § 9-310. *Commerce Acceptance of Okla. City, Inc. v. Press*, 428 P.2d 213 (Okla. 1967).

Under an Illinois statute in effect prior to 1965, a party who had furnished services and materials in the ordinary course of his business for the repair of an automobile and had retained possession of it had a lien under this section superior to the lien of a prior instalment sales contract. *Westlake Fin. Co. v. Spearmon*, 64 Ill. App. 2d 342, 213 N.E.2d 80 (1st Dist. 1965).

13. Consent or lack thereof.

Plaintiff's prior perfected security interest in an automobile which was purchased by defendant at a public auction subject to the security interest and then stored by defendant at codefendant's garage, is superior to the subsequent bailee's lien for garage storage charges; section 9-310 of the Uniform Commercial Code, which provides that the lien of an individual in possession of goods for which he furnished some service or materials in the course of his business takes priority over a perfected security interest in such goods, is inapplicable since plaintiff neither requested nor consented to the storage of the vehicle (Lien Law, § 184) and cannot incur any liability for the storage charges

by reason of defendant's having stored the vehicle at a garage; since the lien for storage charges was incurred at the specific request of defendant, who had full knowledge that the sale of the vehicle was subject to plaintiff's security interest, she appears to be the party liable for the storage charges. *O'Connor v. B.J. Auto Make Ready Corp.*, 101 Misc. 2d 665 (1979), modified, 115 Misc. 2d 575, 455 N.Y.S.2d 164 (1982).

Under UCC § 9-310, common law possessory mechanic's lien had priority over prior perfected security interest, notwithstanding lien statute provided that statutory lien was subordinate to buyer prior perfected security interest unless secured party authorized repairs, since statutory lien was not possessory lien and UCC § 9-310 applies only to possessory liens. *Peavy's Serv. Ctr., Inc. v. Associates Fin. Servs. Co.*, 335 So. 2d 169 (Ala. Civ. App. 1976), cert. denied, 335 So. 2d 172 (Ala. 1976).

Under UCC § 9-310, mechanic's possessory lien on boat had priority over credit union's prior recorded security interest, notwithstanding that lien statute provided that lien shall continue as long as possession continues but not to exceed three months and notwithstanding that mechanic's possession continued beyond three months following completion of work, where owner of boat permitted mechanic to retain possession beyond the three month period and mechanic was in possession of boat at time credit union filed foreclosure suit. *Eastern Airlines Emp. Fed. Credit Union v. Lauderdale Yacht Basin, Inc.*, 334 So. 2d 175 (Fla. App. 1976).

By Code § 9-310, automobile repair shop with valid possessory lien for labor, materials, and storage in connection with repairs ordered by record owner of auto had priority over secured party under sales contract, notwithstanding notation of latter encumbrance on certificate of title. *First Nat'l Bank v. Vargo Motor Co.*, 43 Pa. D. & C.2d 698 (1966).

14. Common law liens.

Under UCC § 9-310, automobile repair shop's lien on automobile took priority over another creditor's earlier perfected security interest in automobile since auto-

mobile repair shop's lien was common law possessory lien for services and materials in connection with repairs it made on automobile. *National Bank v. Bergeron Cadillac, Inc.*, 66 Ill. 2d 140, 361 N.E.2d 1116 (1977).

An artisan's lien to the extent that it affects motor vehicles is a common-law lien and hence does not fall within the exception of this section. *Commonwealth Loan Co. v. Berry*, 2 Ohio St. 2d 169, 207 N.E.2d 545 (1965).

15. Statutory liens.

As to building contract funds owing to bankrupt general contractor, subcontractor had priority, under state's mechanics' lien trust statute, over construction finance agency's prior perfected security interest in general contractor's present and future accounts receivable where finance agency failed to show whether, and to what extent, loan proceeds were used to pay subcontractor. *National Bank v. Eames & Brown, Inc.*, 396 Mich. 611, 242 N.W.2d 412 (1976).

As the federal statute preempts the field of security interests in aircraft a recorded security interest in an aircraft prevails over an unrecorded possessors mechanics' lien. *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (Ch. Div. 1968).

Where the law of the state permits an artisan's lien for storage, as against the contention that there can only be a lien when the value is increased, the priority of the lien is determined by UCC § 9-310. *Philadelphia Nat'l Bank v. K & G Speed Assocs.*, 43 Pa. D. & C.2d 241 (1967).

16. Express exceptions.

Under UCC § 9-310, secured party, who had perfected security interest in trailer, was entitled to possession as against repairman who retained possession of trailer pursuant to statutory lien, where statute creating lien provided, inter alia, that lienor took subject to "other titles, interests, liens, or charges in the same manner that a purchaser would take." *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

In a case arising prior to the effective date of the Colorado UCC and decided

under the statutes of that state in which it was held that where the fact of the existence of a chattel mortgage had been noted on the certificate of title of a motor truck, the lien of the assignee of the security interest was superior to the lien of a garageman who had subsequently furnished labor and materials in repairing the vehicle, the court observed that unlike the form in which this section has generally been enacted, the section in the Colorado UCC provides that a repairman's lien "does not take priority over a perfected security interest unless a statute expressly provides otherwise." *First Sec. Bank v. Crouse*, 374 F.2d 17 (10th Cir. Colo. 1967).

17. Particular liens prior.

Although assignee of claims of medical assistance supplier could not enforce assignment against county department of social services, assignment was enforceable as to all others, and, by filing its security interest in claims prior in time to State's tax warrant, assignee's claim took priority over State's claim for withholding taxes. *IMFC Professional Servs., Inc. v. State*, 59 A.D.2d 1047 (4th Dep't 1977).

Under UCC § 9-310, prior perfected security interest in rock crushing equipment took priority over nonpossessory artisan's lien for repairs on such equipment. *Balzer Mach. Co. v. Klineline Sand & Gravel Co.*, 271 Or. 596, 533 P.2d 321 (1975).

Where assignment transferred significant part of outstanding contract rights to bank, bank was required to file financing statement in order to perfect its security interest under UCC § 9-302, and, where bank failed to perfect security interest until after filing and recording of materialmen's liens, bank was not entitled to priority over liens under UCC § 9-310. *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974).

18. —Builders or the like.

Money "constructively" paid to contractor (i.e., money actually owed to contractor) was subject to lien in favor of labor union and pension fund trusts created by Michigan Builders Trust Fund Act and this lien was superior to security interest of bank, although security interest was perfected under Article 9 of Uniform Com-

mercial Code, as long as secured party could not prove that money lent to contractor under terms of security agreement was, in fact, used to pay laborers, materialmen and others on construction project. *Detroit Metro. Area Executive Comm. of Bricklayers v. Leto Constr. Co.*, 423 F. Supp. 701 (E.D. Mich. 1976).

Mechanic's lien, filed by subcontractor to secure payment of amount due from general contractor, was superior to bank's perfected security interest in general contractor's accounts receivable; when general contractor failed to pay subcontractor and subcontractor filed written mechanic's lien upon subject property, owner of property became directly obligated to pay subcontractor; thus, sum which otherwise would have been due general contractor under contract ceased to be part of general contractor's "contract right" and therefore did not become "accounts receivable" covered by security agreement executed by general contractor in favor of bank. *Citizens Fid. Bank & Trust Co. v. Fenton Rigging Co.*, 522 S.W.2d 862 (Ky. 1975).

19. —Garagemen or the like.

Under UCC § 9-310 possessory mechanic's lien on motor vehicle was entitled to priority over bank's perfected security interest in vehicle. *Krueger v. Texas State Bank*, 528 S.W.2d 121 (Tex. Civ. App. 1975).

Under UCC § 9-310, lender's security interest in motor vehicle, evidenced by lien notation recorded on face of title certificate, was inferior to subsequent mechanic's lien for automobile repairs. *Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421 (Tex. Civ. App. 1974), *aff'd*, 525 S.W.2d 866 (Tex. 1975).

By virtue of UCC § 9-310, subsequent mechanic's lien for repairs to airplane which was in possession of repairman, arising under state law, took priority over prior security interest in airplane that was recorded pursuant to federal law. *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. App. 1974).

Under this section, when a garageman acquires a valid lien for towing, repairing, and storing an automobile, and retains possession of it for the unpaid charges, such lien has priority over a previously perfected security interest while the auto-

mobile is in the possession of the garageman. *Commerce Acceptance of Okla. City, Inc. v. Press*, 428 P.2d 213 (Okla. 1967).

A common-law artisan's lien, asserted by the repairman of an automobile, has priority over a prior perfected security interest of the finance company in the automobile. *Manufacturers Acceptance Corp. v. Gibson*, 220 Tenn. 654, 422 S.W.2d 435 (1967).

A bulldozer is not a motor vehicle within the contemplation of the New Jersey garage keepers lien act, and a repairman who retained a bulldozer in his possession after enhancing its value through labor and materials was entitled to a common law artisan's lien which was superior to the previously perfected security interest of the conditional seller. *Ferrante Equip. Co. v. Foley Mach. Co.*, 49 N.J. 432, 231 A.2d 208 (1967).

Under this section and section 184 of the Lien Law artisan's lien for automobile repair had priority over automobile purchase lien arising out of installment sales contract which was in default. *Schleimer v. Arrowhead Garage, Inc.*, 46 Misc. 2d 607 (1965), *aff'd*, 49 Misc. 2d 775, 267 N.Y.S.2d 995 (1966).

A mechanic's lien for repairing an automobile takes priority over a perfected security interest previously existing. *Corbin Deposit Bank v. King*, 384 S.W.2d 302 (Ky. 1964).

20. Particular liens subject.

Although assignee of claims of medical assistance supplier could not enforce assignment against county department of social services, assignment was enforceable as to all others, and, by filing its security interest in claims prior in time to State's tax warrant, assignee's claim took priority over State's claim for withholding taxes. *IMFC Professional Servs., Inc. v. State*, 59 A.D.2d 1047 (4th Dep't 1977).

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent authority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-

310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. *K Furn. Co. v. Sanders Transf. & Storage Co.*, 532 S.W.2d 910 (Tenn. 1975).

As security interests in aircraft are not subject to Article 9, the provisions of UCC § 9-310 do not confer any priority to the lien of a repairman over a federally-recorded security interest in the aircraft. *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (Ch. Div. 1968).

As the federal statute preempts the field of security interests in aircraft a recorded security interest in an aircraft prevails over an unrecorded possessors mechanics' lien. *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (Ch. Div. 1968).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

Under Alaska law the possessory lien of an artisan is subordinate to the lien of the holder of a perfected security interest. *Decker v. Aurora Motors, Inc.*, 409 P.2d 603 (Alaska 1966).

21. Remedies in satisfaction of liens.

Sale of airplane under Florida mechanic's lien statute by mechanic in possession of plane did not extinguish prior security interest that had previously been perfected by recordation with Federal Aviation Administration Registry, where such sale was conducted without notice to

holder of prior lien, since such a rule would unconstitutionally deprive prior lienholder of interest in property without due process of law. Although the mechanic's lien in such case, under Florida mechanic's lien statute and also UCC § 9-310, had priority over the earlier, federally recorded security interest, the sale under the mechanic's lien statute did not give purchaser at such sale title to the plane free and clear of claim of holder of previously recorded security interest. *First Nat'l Commerce & Fin. Co. v. Indiana Nat'l Bank*, 360 So. 2d 791 (Fla. App. 1978).

Abandoned Motor Vehicle Act provision permitting automobile repairman to sell an abandoned vehicle to pay for the cost of repairs does not conflict with UCC provision pertaining to priority of lien; so that repairer of automobile could sell abandoned automobile and give buyer title free of perfected security interest. *Bryce Hosp. Credit Union v. Warrior Dodge, Inc.*, 50 Ala. App. 15, 276 So. 2d 602 (Civ. App. 1973), cert. denied, 290 Ala. 362, 276 So. 2d 607 (1973).

Evidence was insufficient to support finding that secured party resold automobile in violation of notice requirement of UCC § 9-504(3) where sale was actually conducted by repairman having garageman's possessory repair lien on vehicle in question, which was superior to secured party's perfected security interest under UCC § 9-310, and where evidence failed to show that repairman sold vehicle in concert with or as agent for secured party. *Magnavox Ft. Wayne Employees Credit Union v. Benson*, 165 Ind. App. 155, 331 N.E.2d 46 (1975).

RESEARCH REFERENCES

ALR. Priority as between lien for repairs and the like, and right of seller under conditional sales contract. 36 A.L.R.2d 198.

Priority as between artisan's lien and chattel mortgage. 36 A.L.R.2d 229.

Lien for storage of automobile. 48 A.L.R.2d 894.

Priority as between mechanic's lien and

purchase-money mortgage. 73 A.L.R.2d 1407.

Secured transactions: priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code. 69 A.L.R.3d 1162.

Construction and effect of UCC § 9-311 giving debtor right to transfer his interest

in collateral. 45 A.L.R.4th 411.

Am Jur. 51 Am. Jur. 2d, Liens §§ 60-70, 75.

68A Am. Jur. 2d, Secured Transactions §§ 689 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured

Transactions, Forms 9:381-9:383 (liens for services or materials).

CJS. 79 C.J.S., Secured Transactions §§ 100 et seq.

53 C.J.S., Liens § 14.

§ 75-9-334. Priority of security interests in fixtures and crops.

(a) A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.

(b) This article does not prevent creation of an encumbrance upon fixtures under real property law.

(c) In cases not governed by subsections (d) through (h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Except as otherwise provided in subsection (h), a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase-money security interest;

(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) The security interest is perfected by a fixture filing before the goods become fixtures or within twenty (20) days thereafter.

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(A) Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(B) Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) Before the goods become fixtures, the security interest is perfected by any method permitted by this article and the fixtures are readily removable:

(A) Factory or office machines;

(B) Equipment that is not primarily used or leased for use in the operation of the real property; or

(C) Replacements of domestic appliances that are consumer goods;

(3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article; or

(4) The security interest is:

(A) Created in a manufactured home in a manufactured-home transaction; and

(B) Perfected pursuant to a statute described in Section 75-9-311(a)

(2).

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) The priority of the security interest under paragraph (f) (2) continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f), a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property.

SOURCES: Derived from former 1972 Code § 75-9-313 [Codes, 1942, § 41A:9-313; Laws, 1966, ch. 316, § 9-313; Laws, 1968, ch. 488, § 1; Laws, 1977, ch. 452, § 22; Laws, 1992, ch. 303, § 1, eff from and after July 1, 1992] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-313.

6. In general.
7. "Fixtures".
8. What constitutes security interest in fixtures.
9. Priority as to realty encumbrances; prior.
10. —Subject.
11. —Effect of consent.
12. Priority as to conflicting interests in fixtures.
13. Priority as to lien creditors.
14. Removal of collateral.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-313.

6. In general.

Real estate mortgages are not to be viewed as security agreements within the meaning of the Code just because they happened to contain provisions relating to attached personalty. In re Royer's Bakery, Inc., 58 Lanc. L. Rev. 405 (Pa 1963).

UCC § 9-313(2) is not an unconstitutional impairment of the obligation of contract because it gives a prior lien status to after-installed property as against pre-existing mortgages, because a conditional seller could obtain priority over a mort-

gagee at the time the mortgage was created by filing in accordance with the amended provisions of the Uniform Conditional Sales Act. In re Royer's Bakery, Inc., 58 Lanc. L. Rev. 405 (Pa. 1963).

Rules regulating right of third persons in goods sold under security agreements when affixed or related to realty are set forth in this section. Royal Store Fixture Co. v. Patten, 183 Pa. Super. 249, 130 A.2d 271 (1957).

7. "Fixtures".

A radio transmission tower leased to a corporation and erected upon real property leased to the corporation by a third party did not become a fixture to the property after default by the corporation on its leases where the intention of the tower's lessor and the corporation had been that the tower was to remain the property of the lessor and where, although the tower was 400 feet high, it could be removed merely by detaching the bolts and guy wires which attached it to a concrete slab on the property. Motorola Communications & Elecs., Inc. v. Dale, 665 F.2d 771 (5th Cir. 1982).

New Hampshire UCC § 9-313(1) defers to state law for definition of fixtures. WO Co. v. Benjamin Franklin Corp., 562 F.2d 1339 (1st Cir. N.H. 1977).

Under Arkansas law, a trade fixture is not a "fixture" but is "equipment." In re Factory Homes Corp., 333 F. Supp. 126 (W.D. Ark. 1971).

The local law, apart from the Code, determines whether property constitutes a fixture. In re Royer's Bakery, Inc., 58 Lanc. L. Rev. 405 (Pa. 1963).

8. What constitutes security interest in fixtures.

The clause of a real estate mortgage which extends the coverage of the mortgage to things used in the operation of the business on the mortgaged premises gives the mortgagee security but it is not a security interest within the Code because it relates to a real estate mortgage which is expressly excluded from the Code and is not to be brought within the Code merely because it happens to contain provisions relating to attached personal property. In re Royer's Bakery, Inc., 58 Lanc. L. Rev. 405 (Pa. 1963).

9. Priority as to realty encumbrances; prior.

UCC § 9-313(2) gives security interests in goods which later become fixtures priority over prior interests in the real estate, except to the extent (see UCC § 9-313(4)(c)) that a creditor with an interest in the realty makes subsequent advances. Carefree Homes, Inc. v. Production Credit Ass'n, 81 Wis. 2d 541, 260 N.W.2d 759 (1978).

Under UCC § 9-313, seller of custom-made kitchen appliances was entitled to repossession upon default, but after failing to repossess he was not entitled to maintain action for purchase price against subsequent purchaser of property. Nu-Way Distrib. Corp. v. Schoikert, 44 A.D.2d 840 (2d Dep't 1974).

Seller of internal equipment to be used at saw mill had security interest in equipment which attached before equipment became fixtures attached to saw mill, notwithstanding fact that sales contract was signed four days after equipment had been delivered and installed; thus, under Code § 9-313 seller had priority over saw mill mortgagee. GECC v. Pennsylvania Bank & Trust Co., 56 Pa. D. & C.2d 479 (1972).

Fixture security interest has priority over antecedent interest in real estate. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

Where a security interest has been perfected in plumbing fixtures prior to their attachment to realty the secured party prevails over the holder of a prior mortgage of the real estate although such mortgage contains an after-acquired property clause. Denis v. Shirl-Re Realty Corp., 4 U.C.C. Rep. Serv. 609 (1967, NY Sup).

Under the provisions of the Uniform Commercial Code the title of a conditional vendor to removable fixtures installed upon realty is superior to the lien of a prior mortgage containing the standard after-acquired property clause. Blancob Constr. Corp. v. 246 Beaumont Equity, Inc., 23 A.D.2d 413 (1st Dep't 1965).

Under Arkansas law the lien of a deed of trust executed and recorded prior to the effective date of the UCC takes priority over the lien of the security interest of a

seller of fixtures under a transaction entered into after the Code became effective, and made in strict accordance with the Code's provisions, for the seller of the fixtures was charged with notice of the existence of the deed of trust. *Wilson v. Prudential Ins. Co. of Am.*, 239 Ark. 1071, 396 S.W.2d 300 (1965).

Carpeting furnished to a non-profit corporation was capable of being construed as a fixture, and an unrecorded "conditional sales contract note" covering the carpeting was insufficient to create a security interest which would take priority over an encumbrance created by a prior deed of trust containing an after-acquired property provision. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964).

10. —Subject.

Where financing statement covering steel grain drying bin, which became fixture, was filed in office of county clerk but was not filed in office of registrar of deeds, UCC § 9-401 rendered filing ineffective against bank that subsequently took mortgage on property; under UCC § 9-313, security interest of seller of grain bin, not being properly filed, was not protected, bank's mortgage lien had priority, and purchasers at foreclosure sale acquired all property subject to mortgage, including bin. *Tillotson v. Stephens*, 195 Neb. 104, 237 N.W.2d 108 (1975), overruled on other grounds, *First Nat'l Bank v. Rose*, 213 Neb. 611, 330 N.W.2d 894 (1983).

Applying the New Jersey rule, the court held that a machine used in the manufacture of corrugated boxes, neither attached to the building in which it was located, nor intended to be so attached, was not a fixture, and the holder of the interest could not prevail in a reclamation proceeding against the purchaser's trustee in bankruptcy when the security interest had not been recorded in the office of the Secretary of State. *In re Park Corrugated Box Corp.*, 249 F. Supp. 56 (D.N.J. 1966).

11. —Effect of consent.

Requirement of Florida version of UCC § 9-313 with respect to security interests in fixtures that person seeking to establish security interest obtain written con-

sent or disclaimer from owner of realty (debtor's landlord), was not satisfied by provision in lease generally consenting to improvement, remodeling, and removal of fixtures on termination. *In re Seminole Park & Fairgrounds*, 502 F.2d 1015 (5th Cir. Fla. 1974).

12. Priority as to conflicting interests in fixtures.

Hydraulic lifts installed at gas station prior to lease were fixtures within UCC § 9-313 and alleged lessor which had not filed lease could not prevail as to the lifts over execution levy of trustee in bankruptcy who had no notice of lessor's claimed interest or over purchaser of gas station at bankruptcy sale. *Leawood Nat'l Bank v. City Nat'l Bank & Trust Co.*, 474 S.W.2d 641 (Mo. Ct. App. 1971).

A bank's first mortgage had priority over a security interest arising from the construction of a swimming pool below the surface of the ground covered by the bank's first mortgage, where such pool had become a fixture prior to the advancement of money by the bank claiming the security interest. *State Bank v. Kahn*, 58 Misc. 2d 655 (1969).

The holder of a chattel mortgage covering after-acquired property who established his security interest by properly filing financing statements takes priority over holder of previously executed conditional sales contract covering the same personal property and fixtures. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

13. Priority as to lien creditors.

In action by supplier of air conditioning equipment for diner, to foreclose mechanic's lien and to collect on check issued for cost of air conditioning equipment on which payment had been stopped, diner was real property within meaning of state lien law, notwithstanding that owner of diner and manufacturer-seller of diner had entered into security agreement, pursuant to UCC § 9-313, that diner would remain personal property for financing purposes. *Fedders Cent. Air Conditioning Corp. v. Karpinecz & Sons*, 83 Misc. 2d 720 (1975).

Historical society's unperfected security interest in station used by debtor railroad was not enforceable against creditor with perfected security interest arising out of recorded mortgage, nor against debtor's trustee in bankruptcy who had status of lien creditor. *In re New Hope & I.R.R.*, 353 F. Supp. 608 (E.D. Pa. 1973).

14. Removal of collateral.

What Code provision relating to security interest in fixtures is aiming at is prevention of substantial destruction of building, such as would be case for instance, if new exterior surface had been installed in place of old one; provision may not prevent removal of aluminum siding which has been added to house, provided house will remain substantially in original state after removal. *Dry Dock Sav.*

Bank v. De Georgio, 61 Misc. 2d 224 (1969) (court recognized that this may turn out to be somewhat Pyrrhic victory, giving lienor pile of dubious scrap not worth labor of getting it off house, repairing nail holes, etc. Whether removal of aluminum siding hurts mortgagee without doing lienor any corresponding good was held to be something for parties to consider and beyond control of court).

Where personal property cannot be removed without causing substantial damage to the freehold the after-acquired property clause of the prior mortgage is superior to the purchase money security interest of the seller of such personal property. *Feldzamen v. Paulro Properties, Inc.*, 4 U.C.C. Rep. Serv. 524 (1967, NY Sup).

RESEARCH REFERENCES

ALR. Sprinkler system as fixture. 19 A.L.R.2d 1300.

Amusement apparatus or device as fixture. 41 A.L.R.2d 664.

Air conditioning plant, equipment, apparatus, or the like as fixture. 43 A.L.R.2d 1378.

Electric range as fixture as between mortgagor and mortgagee or successor in interest. 57 A.L.R.2d 1103.

Equitable estoppel of secured party's right to assert prior, perfected security interest against other secured creditor or subsequent purchaser under Article 9 of Uniform Commercial Code. 9 A.L.R.5th 708.

Am Jur. 35 Am. Jur. 2d, Fixtures §§ 34 et seq., 61 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 942 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:126 (instruction to jury; "goods" defined).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:411-9:416 (priorities of security interests in fixtures).

3A Am. Jur. Legal Forms 2d, Bailments and Personal Property Leases § 36:72 (status of property as personalty even when affixed to realty).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3541 et seq. (priority of security interests in fixtures).

CJS. 36A C.J.S., Fixtures § 52.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-9-335. Accessions.

(a) A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Except as otherwise provided in subsection (d), the other provisions of this part determine the priority of a security interest in an accession.

(d) A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under Section 75-9-311(b).

(e) After default, subject to Part 6, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) A secured party that removes an accession from other goods under subsection (e) shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

SOURCES: Derived from former 1972 Code § 75-9-314 [Codes, 1942, § 41A:9-314; Laws, 1966, ch. 316, § 9-314, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-314.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-314.

6. In general.

In a lawsuit arising from a finance company's alleged unlawful conversion of personal property located inside a truck that it repossessed, tires which the purchaser had mounted on the truck became fixtures of the collateral and therefore the amount expended on them was not recoverable as damages. *PACCAR Fin. Corp. v. Howard*, 615 So. 2d 583 (Miss. 1993).

Under UCC § 9-314(1), "accessions" are goods which are "installed in or affixed to other goods." *Murphy v. Beneficial Fin. Co.*, 443 F. Supp. 463 (S.D. Ohio 1976).

Where truck repairer failed to take security interest in rebuilt engine which repairer installed in truck that was subject to prior security interest, repairer was not entitled to protection afforded by UCC § 9-314(1) and was not entitled to remove engine from truck on nonpayment of repair bill. *Ford Motor Credit Co. v. Howell Bros. Truck & Auto Repair*, 57 Ala. App. 46, 325 So. 2d 562 (Ala. Civ. App. 1975).

In replevin action for recovery of automotive property in which plaintiff claimed to have a security interest perfected by filing, sale of automotive property occurred after date of filing and not before filing as required by UCC § 9-314, lien of plaintiff perfected before sale had priority over title of buyer acquired by sale. *Mills-Morris Automotive v. Baskin*, 224 Tenn. 697, 462 S.W.2d 486 (1971).

Where creditor held perfected lien before debtors were adjudicated bankrupt, trustee's lien is subordinate to that of creditor. *In re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

RESEARCH REFERENCES

ALR. Sprinkler system as fixture. 19 A.L.R.2d 1300.

Accession to motor vehicle. 43 A.L.R.2d 813.

Air-conditioning plant, equipment, apparatus, or the like as fixture. 43 A.L.R.2d 1378.

Appliances, accessories, pipes, or other articles connected with plumbing as fixtures. 52 A.L.R.2d 222.

Am Jur. 1 Am. Jur. 2d, Accession and Confusion §§ 1, 3.

68A Am. Jur. 2d, Secured Transactions §§ 955 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:431-9:433 (priorities of security interests in accessions).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3551 et seq. (accessions).

CJS. 1 C.J.S., Accessions §§ 4-8.

79 C.J.S., Secured Transactions §§ 22 et seq.

72 C.J.S., Pledges § 29.

§ 75-9-336. **Commingled goods.**

(a) In this section, “commingled goods” means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) is perfected.

(e) Except as otherwise provided in subsection (f), the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c).

(f) If more than one (1) security interest attaches to the product or mass under subsection (c), the following rules determine priority:

(1) A security interest that is perfected under subsection (d) has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one (1) security interest is perfected under subsection (d), the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

SOURCES: Derived from former 1972 Code § 75-9-315 [Codes, 1942, § 41A:9-315; Laws, 1966, ch. 316, § 9-315, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-315.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-315.

6. In general.

Cattle which ate feed in which party had perfected security interest were not “product” or “mass” as such terms are used in UCC § 9-315(1)(a), so as to preserve such security interest, since feed was not “manufactured, processed, assembled, or commingled” with cattle within meaning of UCC § 9-315(1)(a), but simply became nonexistent after it was eaten. Also, such security interest was not sustainable under UCC § 9-315(1)(b), since party’s financing statement did not specifically cover “product” (cattle) into which feed had allegedly been “manufactured, processed, or assembled.” *First Nat’l Bank v. Bostron*, 39 Colo. App. 107, 564 P.2d 964 (1977).

Perfected security interest in cattle feed did not, in and by itself, extend under UCC § 9-315(1) and UCC § 9-307(1) to cattle which ate such feed since feed, after being eaten, not only lost its identity under UCC § 9-315(1), but also ceased to exist within meaning of UCC § 9-315(1) and UCC § 9-307(1). Moreover, cattle which ate feed did not constitute “proceeds” thereof within meaning of UCC § 9-306(1) and (2). *First Nat’l Bank v. Bostron*, 39 Colo. App. 107, 564 P.2d 964 (1977).

In prosecution for crime of moving and transferring inventory with intent to hinder enforcement of security interests, defendant’s transfer of one business to location of his other business and his commingling of inventories of his two businesses constituted legal behavior in absence of contrary stipulation in security instrument, since, inter alia, under UCC § 9-205, security interest was not invalidated or made fraudulent against creditors by commingling of inventories and UCC § 9-315 protected any security interest in commingled inventory. *Sowards v. State*, 137 Ga. App. 423, 224 S.E.2d 85 (1976).

RESEARCH REFERENCES

ALR. Confusion of goods by accident, mistake, or act of a third person. 39 A.L.R.2d 555.

Am Jur. 1 Am. Jur. 2d, Accession and Confusion § 10 et seq.

69 Am. Jur. 2d, Secured Transactions §§ 959-961.

78 Am. Jur. 2d, Warehouses §§ 107 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:441, 9:442 (priorities of security interests; commingled or processed goods).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3561 et seq. (priority when goods are commingled or processed).

CJS. 79 C.J.S., Secured Transactions § 122.

15A C.J.S., Confusion of Goods §§ 3 et seq.

93 C.J.S., Warehousemen and Depositories §§ 14, 15.

§ 75-9-337. Priority of security interests in goods covered by certificate of title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this state issues a certificate of title that does not

show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under Section 75-9-311(b), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

SOURCES: Derived from former 1972 Code § 75-9-103 [Codes, 1942, § 41A:9-103; Laws, 1966, ch. 316, § 9-103; Laws, 1977, ch. 452 § 6, eff from and after April 1, 1978; Laws, 1990, ch. 384, § 47; Laws, 1996, ch. 460, § 21; Laws, 1996, ch. 468, § 56, eff from and after July 1, 1996] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103(2)(d).

6. Movement of property covered by certificate of title.
7. —Title to nontitle state.
8. —Nontitle to title state.
9. —Between title states.
10. —Between nontitle states.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-103(2)(d).

6. Movement of property covered by certificate of title.

Where bankrupt, using money borrowed from New York bank, purchased second hand truck in Ohio and acquired clean certificate of title in Ohio, bank's security interest not being noted on title certificate as required by Ohio law, bankrupt registered vehicle in Ohio using title certificate, although bank knew nothing of Ohio registration and title certificate nor of bankrupt's intention to register vehicle there, and although truck was garaged principally in New York, in accordance with UCC § 9-103(4) law of Ohio determined existence of perfected security interest prior to bank's lawful repossession of truck in state of New York and bank,

therefore, did not obtain perfected security interest in New York by filing financing statement in New York. In re Osborn, 389 F. Supp. 1137 (N.D.N.Y. 1975) (applying New York law).

UCC § 9-103(4) unequivocally removes application of UCC § 9-103(3) to any personal property covered by a certificate of title issued under a statute of any state which requires indication on a certificate of title of any security interest as a condition of perfection; in other words, one who has a security interest in personal property, perfected in a state which requires the issuance of a certificate of title on such property and the listing thereon of a security interest as a condition of perfection, does not have to protect such security interest by any further action in a state to which the property may thereafter be removed; this places an undue burden on prospective lienees in Alabama which does not have a registration and title statute; it appears the undue hardship to lenders in Alabama resulting from the effect of UCC § 9-103(4) was created by the legislature and must be removed by it, either by repeal, amendment, or passage of other correctional legislation. *Deposit Nat'l Bank v. Chrysler Credit Corp.*, 48 Ala. App. 161, 263 So. 2d 139 (Civ. App. 1972).

UCC § 9-103(4) relating to perfection of security interests in other states is not

repealed by motor vehicle code provision regarding certificate of title to auto, and controls where auto was purchased in Illinois and registered in Ohio, where mortgagee's security interest was noted on Ohio certificate of title, and where owner's judgment creditor knew of foreign registration and that there was some lien, so that mortgagee's security interest under UCC § 9-103(4) was superior to that of creditor. *Town House Motel, Inc. v. Ward*, 2 Ill. App. 3d 699, 276 N.E.2d 809 (5th Dist. 1971).

Under Virginia UCC, perfection of security interest would be governed by law of jurisdiction which issued certificate of title on mobile home, which in this case was West Virginia. *In re Smith*, 311 F. Supp. 900 (W.D. Va. 1970), *aff'd*, 437 F.2d 898 (4th Cir. Va. 1971).

Once a security interest (lien) is noted upon a certificate of title in a state which requires such notation for perfection, security interest (lien) remains perfected when vehicle is removed to another state, even if debtor has not obtained new certificate of title in other state. *Streule v. Gulf Fin. Corp.*, 265 A.2d 298 (D.C. 1970).

Where a house trailer was purchased in Virginia and the certificate of title issued by that state showed a bank's conditional sales contract as a lien thereon, it was unnecessary for the security holder to perfect its lien in New York within four months after the trailer was moved there, for subsection (4), rather than subsection (3) was controlling. *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967).

7. —Title to nontitle state.

Where bank had perfected security interest in automobile in Oklahoma, driver of car fraudulently obtained Oklahoma certificate of title which indicated there were no liens on vehicle, drove car to Nevada and sold it to defendant on May 15, 1971, trial court erred in dismissing bank's complaint for conversion of car on grounds that bank failed to prove car had been brought into Nevada within four-month period immediately preceding date when driver sold car to defendant, as prescribed by UCC § 9-103(3); evidence showed that driver took possession of automobile in Oklahoma in December, 1970, that he made two payments on vehicle

which were mailed from Oklahoma, and that he obtained Oklahoma certificate of title in March, 1971, from which it could be inferred that automobile was in Oklahoma as late as March, 1971, within four months of time when defendant purchased it. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Where Texas bank perfected security interest in automobile located in Texas, a title state, and gave owner permission to take car to New York, a nontitle state, and license it there, with understanding that it would not have to relinquish its Texas title, and where owner, after driving car to New York and obtaining clear New York title certificate, drove car to Washington, a title state, obtained clear Washington title and within four months after leaving Texas sold car to Washington purchaser, Texas law governed initial perfection of security interest and, regardless of whether Texas bank perfected its security interest in compliance with Washington law, its security interest continued under UCC § 9-103(3) to be perfected in Washington for first four months after car was brought into state and, thus, upon owner's default, Texas bank could lawfully repossess car from Washington buyer. *Morris v. Seattle-First Nat'l Bank*, 10 Wash. App. 129, 516 P.2d 1055 (1973).

8. —Nontitle to title state.

New Jersey UCC § 9-103(4) should only be applied to goods which, at the time of entry into New Jersey, are covered by a certificate of title. New Jersey UCC § 9-103(3) should apply to all goods which are moved into New Jersey from noncertificate-of-title jurisdictions. If a certificate of title is subsequently acquired, New Jersey UCC § 9-103(3) remains applicable according to its terms. And with respect to professional buyers of goods, the four-month grace period provided in New Jersey UCC § 9-103(3) is absolute, and bona-fide status is no protection. *IAC, Ltd. v. Princeton Porsche-Audi*, 75 N.J. 379, 382 A.2d 1125 (1978).

In action to foreclose chattel mortgage on mobile home that was assigned to plaintiff by party that financed purchase of such home in British Columbia, Canada, where (1) plaintiff's security in-

terest in such home was perfected by filing under British Columbia law, which did not issue certificates of title to mobile homes; (2) purchasers breached chattel mortgage's provisions by taking home from British Columbia into state of Washington without consent of plaintiff chattel-mortgage holder and secured Washington certificate of title to such home by falsely representing that they owned it free of any lien or security interest therein; and (3) purchasers on basis of such certificate of title obtained loan from Washington lender and lender perfected security interest in home in accordance with Washington law, court would hold under UCC § 9-103(3) and (4), and also Washington statute dealing with perfection and loss of security interest where vehicle subject to interest had certificate of title, that as between the two holders of a perfected security interest in such home, holder of interest perfected in British Columbia had priority, since UCC § 9-103(4) does not apply to all security interests, but only to those that attached after certificate of title to vehicle was issued. *Associates Realty Credit, Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977) (citing annotation; also holding that the holder of security interest perfected in British Columbia must first exhaust its Canadian security before resorting to proceeds of sale, in state of Washington, of mobile home in suit).

Where security interest of secured party with respect to automobile was duly perfected in Arizona and Texas prior to time debtor brought automobile to Oklahoma and where Oklahoma certificate of title was prepared but not issued in Oklahoma, under UCC § 9-103(4), accomplished perfection in Arizona or Texas would continue in Oklahoma and security interest of secured party was superior to claim of subsequent creditor in Oklahoma. *McMillin v. Phoenix Telco Fed. Credit Union*, 429 F. Supp. 131 (W.D. Okla. 1976) (applying Oklahoma law).

Under UCC § 9-103, holder of security interest in automobile, perfected pursuant to laws of Minnesota, a nontitle state, who had no knowledge of its removal to Nebraska, a title state, had priority over Nebraska purchaser without knowledge

of such security interest who purchased automobile with clear Nebraska title within 4 months of its arrival in Nebraska; UCC § 9-103, Official Comment 7, makes it clear that subsection (4) does not apply to automobile which was sold under conditional sales contract in state which does not require indication on certificate of title of any security interest in property as condition of perfection, and which was subsequently brought into state which had such requirement; thus, in present case, pursuant to UCC § 9-103(3), question of whether plaintiff had perfected security interest in automobile when it was brought to Nebraska was governed by Minnesota law. *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974), overruled on other grounds, *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981).

Subsection (4) does not apply to an automobile which was sold under a conditional sales contract in a state that does not require indication on a certificate of title of any security interest as a condition of perfection, although the automobile was subsequently brought into a state which had such a requirement. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

Under subsection (3) of this section the New York assignee of a conditional sales contract who has filed the contract in accordance with the then existing Uniform Commercial Code had made its reservation of title valid against all persons under New York Law as that state did not require a notation of the seller's interest to appear on the title certificate, and at time the car buyer purported to sell it in Pennsylvania, the assignee held a perfected security interest in the car in that state. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

9. —Between title states.

Where (1) buyer purchased 1974 pickup truck on July 12, 1974, (2) secured party perfected security interest therein under New York law by obtaining certificate of title on which secured party's lien was noted, (3) buyer moved from New York to Oklahoma on June 13, 1975, and applied for and received Oklahoma certificate of

title for such truck without surrendering New York certificate of title, which was still in secured party's possession in New York, (4) buyer was adjudicated bankrupt on October 18, 1976, and (5) secured party, as of date of buyer's adjudication of bankruptcy, had not filed any financing statement in Oklahoma reflecting its security interest in truck, court held that bankruptcy judge did not err in holding that notation of secured party's lien on New York certificate of title, which remained outstanding and unsurrendered on buyer's relocation to Oklahoma, was not sufficient to maintain secured party's perfected security interest in truck under UCC § 9-103(4). In such case, UCC § 9-103(3)-providing that previously perfected security interest in property subsequently brought into a second state continues perfected in second state for four months, after which it must be reperfected in second state-applies, and since secured party had never filed financing statement concerning truck in Oklahoma, it had no perfected security interest in truck as of date on which debtor was adjudicated bankrupt. In re Foster, 445 F. Supp. 949 (N.D. Okla. 1978) (applying Oklahoma law).

Where (1) Canadian creditor, which was assignee of buyer's automobile-purchase contract with Canadian dealer, perfected its lien on vehicle under Canadian law, (2) buyer acquired Canadian certificate of registration which did not require notation thereon of creditor's security interest, (3) buyer drove car to New Jersey, where he changed Canadian registration to New Jersey registration and fraudulently obtained "clean" New Jersey certificate of title which showed no liens on vehicle, (4) buyer within four days after purchasing vehicle sold it to New Jersey used-car dealer, which in turn sold it to one of its customers, and (5) Canadian creditor sued New Jersey dealer for conversion, court would hold, on reinstating trial court's granting of summary judgment for plaintiff, (1) that New Jersey UCC § 9-103(3) and (4) should be interpreted to protect interest of foreign lienholder, (2) that priority of plaintiff's perfected security interest under Canadian law was not defeated by original buyer's fraudulent securing of

"clean" New Jersey certificate of title, and (3) that defendant dealer and professional buyer, which in good faith purchased vehicle with "clean" certificate of title, was not entitled to prevail over plaintiff which held valid but undisclosed foreign lien. IAC, Ltd. v. Princeton Porsche-Audi, 75 N.J. 379, 382 A.2d 1125 (1978) (noting that New Jersey had not adopted 1972 amendment of UCC § 9-103).

Auto subject to security interest perfected under Oklahoma law was brought into Texas without knowledge or consent of owners or holder of security interest; Texas certificate of title was issued to plaintiff dealer's predecessor in interest; held, dealer took subject to outstanding security interest. Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co., 454 S.W.2d 465 (Tex. Civ. App. 1970), aff'd, 465 S.W.2d 933, 42 A.L.R.3d 1158 (Tex. 1971) (superseded by statute as stated in *Rutherford v. Whataburger, Inc.* (CA 5th Dist) 601 SW2d 441).

Truck was not sold in ordinary course of business; buyer had no knowledge of Florida source of origin of truck; buyer inquired of seller and checked proper county offices in New York and found that no liens had been filed against truck; Florida bank held chattel mortgage on truck; bank had permitted seller, who had acquired title in Florida, to register title in New York; both New York and Florida are title states; seller had failed to use proceeds of sale to pay off lien; held, lien of bank was subordinated to buyer's purchase interest. *Seely v. First Bank & Trust*, 64 Misc. 2d 845 (1970).

10. —Between nontitle states.

Where finance company had perfected security interest in automobile in Oklahoma, a non-title state, car was registered in Alabama, also a non-title state, and then certificate of title was issued in Georgia, a certificate of title state, which showed no security interest, and vehicle was subsequently sold to purchaser in Alabama within four months after vehicle was removed from Oklahoma, finance company's security interest was in full force and effect in Alabama when purchaser bought car and, hence, finance company's claim was superior to that of purchaser. *GMAC v. Long-Lewis Hdwe.*

Co., 54 Ala. App. 188, 306 So. 2d 277 (Civ. App. 1974), cert. denied, 293 Ala. 752, 306 So. 2d 282 (1974).

§ 75-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in Section 75-9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-339. Priority subject to subordination.

This article does not preclude subordination by agreement by a person entitled to priority.

SOURCES: Derived from former 1972 Code § 75-9-316 [Codes, 1942, § 41A:9-316; Laws, 1966, ch. 316, § 9-316, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Variation of provisions of this Code by agreement, see § 75-1-102(3).

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-316.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-316.

6. In general.

A vendor, by making an unconditional assignment of his note and deed of trust to a bank, and by filing that assignment in

the Chancery Clerk's office conjunctive with an erroneous pay-off figure given by the bank to the closing attorney for a second bank which lent purchasers money secured by the real estate, required that the vendor's deed of trust be subordinated to the second bank's deed of trust. *Cain v. Robinson*, 523 So. 2d 29 (Miss. 1988).

No agreement existed, as matter of law, to subordinate perfected security interest to unperfected security interest pursuant to UCC § 9-316 where (1) evidence did not show that parties had ever agreed, in writing or orally, to enter into such an agreement, and (2) creditor alleging exist-

ence of subordination agreement did not change its position in reliance thereon. *A-W-D, Inc. v. Salkeld*, 175 Ind. App. 443, 372 N.E.2d 486 (1978).

Supplier of goods on open account, which held perfected security interest in debtor's inventory and accounts, was entitled under UCC § 9-312(1) to prevail in action against second supplier of goods to same debtor for value of goods removed by second supplier from debtor's inventory, where (1) second supplier's security interest in debtor's goods was not perfected, and (2) evidence did not sustain second supplier's contention that first supplier had, under UCC § 9-316, orally subordinated its perfected security interest to second supplier's unperfected security interest. *A-W-D, Inc. v. Salkeld*, 175 Ind. App. 443, 372 N.E.2d 486 (1978).

When mortgagee of real estate agreed that title to saw mill equipment to be installed on premises should remain in seller of equipment until all amounts due under contract for sale of equipment had been paid, this obligation bound mortgagee under any subsequent refinanced or new mortgages with mortgagor covering substantially same real estate and fixtures, in accordance with Code § 9-316. *GECC v. Pennsylvania Bank & Trust Co.*, 56 Pa. D. & C.2d 479 (1972).

The legal priority of security interests perfected by chronological order of filing may be subordinated by agreement between creditors under UCC § 9-316, and such subordination agreements need not be cast in any particular form and may be verbal. *Williams v. First Nat'l Bank & Trust Co.*, 482 P.2d 595 (Okla. 1971).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 792 et seq.
6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:451, 9:452 (priorities of security interests; subordination by agreement).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3571 et seq. (priority subject to subordination).

SUBPART 4.

RIGHTS OF BANK.

- SEC.
- 75-9-340. Effectiveness of right of recoupment or set-off against deposit account.
 - 75-9-341. Bank's rights and duties with respect to deposit account.
 - 75-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

§ 75-9-340. Effectiveness of right of recoupment or set-off against deposit account.

- (a) Except as otherwise provided in subsection (c), a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.
- (b) Except as otherwise provided in subsection (c), the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.
- (c) The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit

account which is perfected by control under Section 75-9-104(a)(3), if the set-off is based on a claim against the debtor.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

§ 75-9-341. Bank's rights and duties with respect to deposit account.

Except as otherwise provided in Section 75-9-340(c), and unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

- (1) The creation, attachment, or perfection of a security interest in the deposit account;
- (2) The bank's knowledge of the security interest; or
- (3) The bank's receipt of instructions from the secured party.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

§ 75-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

This article does not require a bank to enter into an agreement of the kind described in Section 75-9-104(a) (2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.

SOURCES: Derived from 1972 Code § 75-8-106 [Laws, 1996, ch. 468, § 7] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

PART 4.

RIGHTS OF THIRD PARTIES.

SEC.

- | | |
|-----------|--|
| 75-9-401. | Alienability of debtor's rights. |
| 75-9-402. | Secured party not obligated on contract of debtor or in tort. |
| 75-9-403. | Agreement not to assert defenses against assignee. |
| 75-9-404. | Rights acquired by assignee; claims and defenses against assignee. |
| 75-9-405. | Modification of assigned contract. |
| 75-9-406. | Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective. |
| 75-9-407. | Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest. |

- 75-9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.
- 75-9-409. Restrictions on assignment of letter-of-credit rights ineffective.

Editor's Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under "Judicial Decisions" were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

§ 75-9-401. Alienability of debtor's rights.

(a) Except as otherwise provided in subsection (b) and Sections 75-9-406, 75-9-407, 75-9-408, and 75-9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article.

(b) An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

SOURCES: Former 1972 Code § 75-9-401 [Codes, 1942, § 41A:9-401; Laws, 1966, ch. 316, § 9-401; Laws, 1968, ch. 489, § 1; Laws, 1977, ch. 452, § 24; Laws, 1982, ch. 439; Laws, 1984, ch. 454, § 1; Laws, 1995, ch. 329, § 1, eff from and after July 1, 1995] is now found in comparable provisions enacted at § 75-9-501 by Laws, 2001, ch. 495, § 1. Present § 75-9-401 was derived from former 1972 Code § 75-9-311 [Codes, 1942, § 41A:9-311; Laws, 1966, ch. 316, § 9-311, eff March 31, 1968] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Scope of Article, see § 75-9-109.

Conditions of enforceability, see § 75-9-203.

Right of the debtor to use collateral, see § 75-9-205.

Attachment in chancery, see §§ 11-31-1 et seq.

Attachment at law, see §§ 11-33-1 et seq.

Garnishment, see §§ 11-35-1 et seq.

Executions, see §§ 13-3-111 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-311.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-311.

6. In general.

Where (1) bank had perfected security interest in original debtor corporation's

inventory, fixtures, and equipment, including after-acquired property, which was superior to lien later obtained by junior lienor under promissory note secured by same collateral, (2) original debtor corporation defaulted on notes given to bank (senior lienor) and to junior lienor, (3) junior lienor without informing bank took over assets of original debtor corporation, transferred them to newly formed corporation, began selling the original inventory which had become commingled with new inventory, and, with

respect to original debtor corporation's assets, filed foreclosure complaint against bank and former owners of original debtor corporation alleging that he had taken possession of original debtor corporation's property, subject to bank's security interest, and was seeking to discharge obligation owed to bank in order to become owner of such property, and (4) bank filed complaint in replevin and took possession of collateral, trial court's judgment in favor of bank-which held that bank's security interest was at all times paramount to junior lienor's lien, that after-acquired property clause in bank's security agreement with original debtor corporation covered items that junior lienor had added in his operation of business under new corporation, and that bank should sell collateral, satisfy its own security interest from sale proceeds, and give remaining proceeds to junior lienor-was affirmed because (1) bank's after-acquired property clause effectively covered inventory and proceeds of both original debtor corporation and new corporation, (2) bank's security interest continued in collateral, including after-acquired property, under UCC § 9-306(2) and § 9-311, which must be read together, and (3) since junior lienor, on default of original debtor corporation, did not proceed in accordance with UCC § 9-505(2) in attempting to retain collateral, disposition of collateral ordered by trial court was proper. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

Although UCC § 9-311 provides that debtor's rights in collateral may be voluntarily or involuntarily transferred, such provision must be read together with UCC § 9-306(2) which provides that security interest continues in collateral, notwithstanding sale, exchange, or other disposition thereof by debtor, unless debtor's action was authorized by secured party in security agreement or otherwise. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

In marital property-division proceeding, trial court had authority under UCC § 9-311, providing that debtor's rights in collateral may be voluntarily or involuntarily transferred by judicial process, to

direct husband to transfer title to bonds, which had been pledged as security for loan, to wife. However, any title that was involuntarily transferred by judicial order would be subject, under UCC § 9-306(2), to security interest created by the pledge, since wife, as party to suit in which such transfer was made, was not buyer in ordinary course of business under UCC §§ 1-201(9) and 9-307(1) who could take collateral (bonds) free of pledgee's security interest therein. *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App. 1978).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Under UCC § 9-311, transfer by debtor of property which is subject to a security interest is not wrongful in itself and does not result in an automatic default. Moreover, under UCC § 9-306(2), debtor's sale of the property does not destroy or affect continuing validity of creditor's security interest. *Production Credit Ass'n v. Equity Coop Livestock Sales Ass'n*, 82 Wis. 2d 5, 261 N.W.2d 127 (1978).

Contention by both pledgor and pledgee that trial court's order, in supplementary proceedings held under Illinois Civil Practice Act, for sale of securities pledged as collateral for two demand notes violated UCC § 9-311 could not be sustained, since proceedings in question came within scope of phrase "other judicial process" in UCC § 9-311, dealing with voluntary and involuntary transfers of debtor's rights in col-

lateral. *North Bank v. F & H Resources, Inc.*, 53 Ill. App. 3d 950, 369 N.E.2d 174 (1st Dist. 1977).

Where New York debtor assigned accounts receivable to New York creditor under terms of security agreement and secured creditor complied with all steps required by UCC to perfect its security interest in such accounts, New York creditor's perfected security interest attached as soon as accounts came into existence and took priority over interest of Colorado creditor, as lien creditor under writ of attachment, with respect to accounts owed debtor by Colorado account debtors. *Barocas v. Bohemia Import Co.*, 33 Colo. App. 263, 518 P.2d 850 (1974).

Provision in security agreement that any change in ownership would constitute default was not invalid under UCC § 9-311; thus, secured party was entitled to accelerate due date on promissory notes which were given in connection with sale of restaurant business, signed by individual purchasers as well as purchasing corporation, and secured by real estate mortgage on restaurant, security agreement covering personal property in restaurant, and pledge of stock in purchasing corporation, where individual purchasers caused stock in purchasing corporation to be transferred to third party and where large part of value of assets constituting security depended upon continuance of valid liquor license and successful carrying on of restaurant business on premises and unsuitable, irresponsible, or dishonest purchaser could lose license and/or destroy or "milk" business, leaving empty shell. *Poydan, Inc. v. Agia Kiriaki, Inc.*, 130 N.J. Super. 141, 325 A.2d 838 (Ch. Div. 1974), *aff'd*, 139 N.J. Super. 365, 354 A.2d 99 (1976).

Under Delaware law prior creditor's security interest in chattels is extinguished by execution sale under Code § 9-311, although he enjoys priority position as to proceeds. *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972).

Even though seller of tractor had per-

fectured its lien for unpaid purchase price by taking security agreement and filing financing statement in compliance with UCC, bank's action in causing encumbered tractor to be sold under attachment did not amount to conversion, since seller's right to enforce its lien against the tractor was in no way adversely affected by attachment sale. *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972).

A bank as the holder of a security interest in the inventory of a furniture retailer had no right of action in replevin against the sheriff who seized the goods under a levy of execution issued to satisfy the judgment of another of the retailer's creditors; for the security holder had no right of possession and was protected only by the fact that the execution sale was subject to its interest. *First Nat'l Bank v. Sheriff of Milwaukee County*, 34 Wis. 2d 535, 149 N.W.2d 548 (1967).

Where the debtor makes a prohibited assignment of the collateral he is bound by his act as against the transferee and cannot avoid the transfer on the ground that it was contrary to the security agreement. *Miller v. Bonafied Ready Mix Corp.*, 4 U.C.C. Rep. Serv. 881 (1967, NY Sup).

Code § 9-311 does not exempt prior secured chattel from forced judicial sale by later judgment creditor. *Altec Lansing v. Friedman Sound, Inc.*, 204 So. 2d 740 (Fla. App. 1967).

The existence of an outstanding security interest in collateral does not prevent an execution creditor of the debtor from causing an execution sale of the collateral, the sale being subject to any outstanding perfected security interest. *Altec Lansing v. Friedman Sound, Inc.*, 204 So. 2d 740 (Fla. App. 1967).

This section does not give the conditional vendee of an automobile the right to sell it free of the interest of an assignee of the conditional vendor, but rather it sanctions sale or other creditor remedies against the debtor's equity in the vehicle. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

RESEARCH REFERENCES

ALR. Validity of anti-assignment clause in contract. 37 A.L.R.2d 1251.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 138, 139, 144-148.

68A Am. Jur. 2d, Secured Transactions §§ 550 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:571-9:573 (alienability of debtor's rights; judicial process).

19 Am. Jur. Legal Forms 2d, Uniform

Commercial Code: Article 9 — Secured Transactions, §§ 253:3521 et seq (alienability of debtor's rights; judicial process).

CJS. 7 C.J.S., Attachment §§ 72-74.

79 C.J.S., Secured Transactions § 115260.

33 C.J.S., Executions §§ 26, 48, 49.

38 C.J.S., Garnishment §§ 102 et seq.

72 C.J.S., Pledges §§ 41-43.

§ 75-9-402. Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

SOURCES: Former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-502, 75-9-503, 75-9-504, 75-9-506, 75-9-507, 75-9-512, and 75-9-521 by Laws, 2001, ch. 495, § 1. Present § 75-9-402 was derived from former 1972 Code § 75-9-317 [Codes, 1942, § 41A:9-317; Laws, 1966, ch. 316, § 9-317, eff March 31, 1968] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Delegation of performance of duties under sales contract by assignment thereof, see § 75-2-210(4).

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-317.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-317.

6. In general.

In action by assignee for balance due on sales contract involving trade-in of defendant's combine for combine owned by seller and assignor of such contract (defunct implement dealer), where evidence showed that defendant traded in his combine to assignor; that contract was concurrently executed and assigned to plaintiff;

that at time contract was entered into and assigned, both assignor and assignee made certain representations to defendant concerning combine that defendant received under contract; that in violation of such representations, assignor and assignee failed to perform required repair work on combine received by defendant, and that they ultimately took possession of such combine and thereby repudiated the sales contract; and that combine that defendant traded in was not returned to him, defendant could recover on counterclaim against plaintiff-assignee value of combine defendant had traded in, in addition to being absolved from making any payments on the contract, because (1) under UCC § 9-318(1), rights of assignee of contract rights are subject to all terms of contract between account debtor and

assignor, and also to any defense or claim arising therefrom; (2) term “claim” includes setoffs and counterclaims; (3) in present case, plaintiff was more than mere assignee accepting right to payments under a contract, since plaintiff had participated in making the sale by orally affirming seller’s promises to defendant and contract was concurrently executed and assigned to plaintiff; and (4) had plaintiff not taken assignment under such circumstances, UCC § 9-317 would have applied, and defendant’s recourse would only have been against defunct assignor for indebtedness arising out of contract. *Massey-Ferguson Credit Corp. v. Brown*, 173 Mont. 253, 567 P.2d 440 (1977).

Assignment for security purposes of promissory note, secured by deed of trust

on real property, was subject to provisions of Article 9, and did not result in delegation of duties to perform under promissory note and deed of trust offered as collateral since, by virtue of UCC §§ 2-210(4) and 9-317, a “financing assignment” assignee receives only rights or benefits inherent in collateral involved and does not assume liabilities. *Black v. Sullivan*, 48 Cal. App. 3d 557 (5th Dist. 1975).

Credit corporation, which was assignee of “lease” of crane containing provision that title to crane would pass to lessee upon completion of payment schedule, was assignee of security interest and, under UCC § 9-317, was not liable in contract or tort for acts or omissions of lessor or lessee. *Brandes v. Pettibone Corp.*, 79 Misc. 2d 651 (1974).

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions § 927.

6 Am. Jur. Pl & Pr Forms (Rev), Secured

Transactions, Form 9:581 (liability for debtor’s acts or omissions).

§ 75-9-403. Agreement not to assert defenses against assignee.

(a) In this section, “value” has the meaning provided in Section 75-3-303(a).

(b) Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) For value;

(2) In good faith;

(3) Without notice of a claim of a property or possessory right to the property assigned; and

(4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under Section 75-3-305(a).

(c) Subsection (b) does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under Section 75-3-305(b).

(d) In a consumer transaction, if a record evidences the account debtor’s obligation, law other than this article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) Except as otherwise provided in subsection (d), this section does not displace law other than this article which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee.

SOURCES: Former 1972 Code § 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] is now found in comparable provisions enacted at §§ 75-9-515, 75-9-516, 75-9-519, 75-9-522, and 75-9-525 by Laws, 2001, ch. 495, § 1. Present § 75-9-403 was derived from former 1972 Code § 75-9-206 [Codes, 1942, § 41A:9-206; Laws, 1966, ch. 316, § 9-206, eff March 31, 1968] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Security transactions excluded from provisions of code respecting sales of goods, see § 75-2-102.

Rights of holder in due course of commercial paper, see § 75-3-305.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-206.

6. In general; scope.
7. Waiver as against public policy.
8. —Not against public policy.
9. "Consumer goods".
10. Defenses waived and not waived.
11. —Failure of consideration; nonperformance.
12. —Fraud in the inducement.
13. —Warranties.
14. Enforceability of waiver.
15. —Good faith.
16. —Notice.
17. —Relation of assignee to seller.
18. —Particular applications.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-206.

6. In general; scope.

Where status as "seller" outweighs status as "assignee", party should not be

accorded protection of assignee against defenses that derived from its actions as seller. *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57 (Ky. 1969).

A tractor buyer's agreement set forth in a "time sale agreement" that he will not use any claim against the seller as a defense, setoff or counterclaim against an assignee is authorized under subsec. (1) of this section. *Root v. John Deere Co. of Indianapolis, Inc.*, 413 S.W.2d 901 (Ky. 1967).

7. Waiver as against public policy.

A waiver by the buyer of his defenses is invalid as unconscionable and against public policy. *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

A provision in a conditional sale agreement whereby the buyer agreed to waive, as against an assignee of the seller, any defenses which the buyer might have against the seller is void as against public policy. *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

8. —Not against public policy.

Waiver of defense clause implied in retail instalment sales contract by virtue of Code § 9-206(1) would not nullify requirements of Illinois Consumer Fraud Act. *HFC v. Mowdy*, 13 Ill. App. 3d 822, 300 N.E.2d 863 (2d Dist. 1973).

Provision in instalment sales contract whereby purchaser of automobile waived, as against assignee of contract, defenses which could have been asserted against assignor-seller, as authorized by UCC § 9-206(1), was not contrary to public policy and, in absence of any showing of unconscionable conduct by parties, was enforceable against purchaser by bank that took assignment of contract in good faith. *Holt v. First Nat'l Bank*, 297 Minn. 457, 214 N.W.2d 698 (1973).

Buyer's covenant in a conditional sales contract that he will not assert any claim or defense against an assignee does not offend against public policy. *GECC v. Tidenberg*, 78 N.M. 59, 428 P.2d 33, 40 A.L.R.3d 1151 (1967).

9. "Consumer goods".

Bowling alley equipment is not "consumer goods" within the meaning of subd (1) of this section. *Noblett v. GECC*, 400 F.2d 442 (10th Cir. Okla. 1968), cert. denied, 393 U.S. 935, 89 S. Ct. 295, 21 L. Ed. 2d 271 (1968).

A tractor purchased by a construction company is not "consumer goods," as the term is used in this section. *Beam v. John Deere Co.*, 240 Ark. 107, 398 S.W.2d 218 (1966).

10. Defenses waived and not waived.

Absent any allegations of bad faith on part of assignee of retail instalment contract for sale of tractor or of assignee's participation as principal in sale of tractor or in originating contract involved, court did not err in allowing demurrer to defense of rescission for material misrepresentation based upon allegation that seller's employee represented rate of interest on contract balance to be 7.5 percent per annum, while interest rate was in fact 14.4 percent per annum. *John Deere Indus. Equip. Co. v. Delphia*, 266 Or. 116, 511 P.2d 386 (1973).

Waiver of defense clause in contract constitutes complete defense to buyer's

counterclaim for breach of contract, because assignee of conditional sales contract took assignment for value, in good faith, and without notice of claim or defense to debt; assignee was entitled to recover against buyer amount owing under assigned contract, independently of any claim to damages buyer may have had against seller for seller's alleged breach of contract. *Jennings v. Universal C.I.T. Credit Corp.*, 442 S.W.2d 565 (1969).

11. —Failure of consideration; non-performance.

In action by holder of note and chattel mortgage on tractor against purchaser of tractor as maker of note, UCC § 9-206 did not preclude purchaser-maker from raising defense of lack of consideration, notwithstanding there was agreement in mortgage not to set up defenses against assignee, where pleading and proof by purchaser-maker was that there never was delivery of stated consideration for note—the tractor—and evidence was clear and uncontradicted that assignee-holder's agent knew that fact when assignment was made; UCC § 9-206 does not preclude defense by maker of which assignee has notice. *Associates Disct. Corp. v. Fitzwater*, 518 S.W.2d 474 (Mo. Ct. App. 1974).

Assignee who does not take assignment "in good faith" is not entitled to protection of "cut-off" provisions of Code § 9-206, so that whatever claims and defenses consumer has with respect to instalment contracts may be asserted against assignee thereof; held, where seller had delivered only freezer and not frozen food called for by contract, assignee was not entitled to maintain action for payments due but could repossess freezer. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290 (1969).

Seller breached service contract for TV set; notwithstanding waiver of defense clause in installment contract, assignee had no greater rights of recovery against buyers than seller-assignor would have had in absence of assignment; held, assignee was barred by seller's breach of service contract from recovery of balance due on contract. *Fairfield Credit Corp. v. Donnelly*, 158 Conn. 543, 264 A.2d 547, 39 A.L.R.3d 509 (1969).

Failure of consideration can be raised as a defense either against the assignee or assignor of a lease or sales contract, in the absence of a specific waiver of such defense on the part of the buyer or lessor. *Noblett v. GECC*, 400 F.2d 442 (10th Cir. Okla. 1968), cert. denied, 393 U.S. 935, 89 S. Ct. 295, 21 L. Ed. 2d 271 (1968).

The provision in a lease of bowling alley equipment to the effect that an assignee of the lessor shall not be responsible for any of the lessor's obligations thereunder will not estop the lessee from asserting against the assignee any and all defenses for nonperformance which are available to him against the lessor. *Noblett v. GECC*, 400 F.2d 442 (10th Cir. Okla. 1968), cert. denied, 393 U.S. 935, 89 S. Ct. 295, 21 L. Ed. 2d 271 (1968).

A buyer may in the execution of a retail instalment contract waive, as against an assignee, any defenses except those enumerated in §§ 3-305(2) and 9-206(2), and as against the assignee of such a contract the buyer's alleged defenses of failure of consideration and subsequent promise and failure to repair the automobile which was the subject of the contract having been specifically waived in the instrument itself are unavailing. *First Nat'l Bank v. Husted*, 57 Ill. App. 2d 227, 205 N.E.2d 780 (2d Dist. 1965).

12. —Fraud in the inducement.

Fraud in the inducement is an insufficient defense to a waiver of defenses provision in an assignment clause (Uniform Commercial Code, § 9-206, subd [1]) since fraudulent inducement is not a defense "of a type which may be asserted against a holder in due course", in that fraud in the inducement renders an obligation voidable, but not void, and is also not an available misrepresentation defense (Uniform Commercial Code, § 3-305, subd [2], pars [b], [c]); however, plaintiff bank, the assignee of an equipment lease and guarantee executed by defendants as part of a franchise agreement with the assignor, a muffler franchisor, is not entitled to summary judgment to recover the balance due and owing under the lease and remains vulnerable to defendants' claim of fraud in the inducement at this juncture since it failed to submit any proof sufficient to

meet its burden of establishing that it took the assignment in good faith and without notice of any claims or defenses; defendants' allegations that the assignor entered into the lease and franchise agreements with the express purpose of fleecing the defendants and that plaintiff had notice of the assignor's fraudulent conduct raise a triable issue of fact as to notice sufficient to defeat plaintiff's motion for summary judgment. *Chase Manhattan Bank v. Finger Lakes Motors, Inc.*, 102 Misc. 2d 48 (1979).

Where (1) certain estoppel documents were substantial equivalent of agreement by lessee of machines that it would not assert against an assignee any claim or defense that it might have against the lessor, and (2) where such agreement by lessee was enforceable under UCC § 9-206(1) by assignee who took assignment for value, in good faith, and without notice of a claim or defense thereto, court would hold that in addition to certain defenses, which on an earlier appeal had been held to be barred by estoppel documents in suit, lessee also could not assert against an assignee defense of original lessor's fraud in the inducement where record failed to raise triable issue that assignee had had knowledge or notice of such fraud. *B.V.D. Co. v. Marine Midland Bank*—New York, 60 A.D.2d 544 (1st Dep't 1977).

13 —Warranties.

In action by creditor, to which installment contracts to purchase animal-feeding equipment had been assigned, for deficiency judgment for amount remaining unpaid by defendant buyers after creditor's repossession and sale of equipment at public auction, wherein buyers contended that creditor had purchased such contracts subject to all warranties and representations made to buyers by seller, court held (1) that contracts expressly provided (a) that seller intended to assign them to creditor, and (b) that buyers had consented to such assignments and condition thereof that seller would be solely responsible for any warranties made on sale of equipment, (2) that agreement by buyers not to assert against creditor any claim or defense that they might have against seller was clearly sanctioned by UCC § 9-206(1), (3) that since seller had

assigned to creditor any security interest that seller had in equipment, seller did not retain purchase-money security interest therein within meaning of UCC § 9-206(2), and (4) that since terms of contracts clearly conferred on creditor, under UCC § 9-206(1), status of holder in due course with respect to the assignments, buyers' remedies for any breach of express or implied warranties involved in sale lay only against seller, who was not party to suit. *AgriStor Credit Corp. v. Lewellen*, 472 F. Supp. 46 (N.D. Miss. 1979).

Where (1) lessor of computer, after purchasing it from manufacturer, leased it to lessee for 72 months at fixed rental per month, (2) lease provided that lessee could renew lease for one year for sum that equalled amount of one monthly rent payment and that at end of such renewal, lessee would become owner of computer, (3) lessee's obligation to pay rent was absolute and unconditional, and lease was not cancellable, (4) lessor disclaimed all warranties, express or implied, including implied warranties of merchantability and fitness for particular use, (5) computer did not function properly, and (6) lessee defended refusal to pay further rent on ground of failure of consideration, court held (1) that under UCC § 1-201(37), lease as a matter of law was actually intended as security agreement, especially since lessee could become owner of computer by paying amount that was equivalent to only one monthly rental, (2) that since lessor was to be viewed as conditional seller of computer, UCC § 9-206(2) applied with respect to effectiveness of lessor's disclaimer of warranties, (3) that warranty disclaimer in lease clearly satisfied requirements of UCC § 2-316(2) for exclusion or modification of warranties, (4) that lessee's remedy was solely against manufacturer of computer, instead of lessor, and (5) that under UCC § 9-501(1), lessor, with respect to lessee's failure to pay rent, had rights and remedies provided in security agreement between the parties, which agreement provided that on lessee's default and demand by lessor, lessee would pay amount equal to all unpaid rentals under the lease, plus interest at specified rate. *Citicorp Leasing, Inc. v. Allied Institutional Distribs., Inc.*, 454 F. Supp. 511 (W.D. Okla. 1977).

Where buyer of new pickup truck sued dealer, manufacturer, and credit company to which buyer's instalment-purchase contract had been assigned for damages for breach of warranty and credit company counterclaimed for balance due on purchase price, rights of credit company were subject under UCC § 9-318 to all terms of contract between buyer and dealer, including any defenses arising from such contract, since buyer had not agreed pursuant to UCC § 9-206 not to assert any claims or defenses against credit company and language of contract did not prevent buyer from asserting defense of breach of express warranty. However, although evidence sustained defense of breach of express warranty, such defense was not complete bar to credit company's counterclaim for balance due on purchase price but could only be used under UCC § 2-717 as setoff against balance due, since buyer at time of suit had driven vehicle approximately 49,000 miles and had not rejected acceptance of vehicle or properly revoked acceptance thereof under the Uniform Commercial Code. *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977).

Under Pennsylvania Code § 9-206(2), disclaimer of warranties contained in purchase money security agreement could not as matter of law disclaim implied warranties previously created in written sales arrangement. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711, 83 A.L.R.3d 636 (1973).

Where the contract of purchase of certain alcoholic liquor dispensers contained an express warranty of merchantability, a subsequent conditional sales agreement extending credit to the purchaser, under which the purchaser acknowledged delivery and acceptance of the articles without warranty, guarantee or representation of any kind, could not limit or release the seller from liability for any warranty made by the seller at the time the sales contract was executed. *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

14. Enforceability of waiver.

Contract which contained a provision stating that the purchaser "agrees not to set up any claim against the seller as a defense, counterclaim or offset to any ac-

tion by any assignee for the time balance or for possession of the collateral," was effective under law of Mississippi where the assignee took the assignment "for value, in good faith and without notice of a claim or defense" and was enforceable by the assignee subject to any statutes or decisions which interpreted waiver of defense clauses as unconscionable in purchases of consumer goods. *Grumman Credit Corp. v. Rippee*, 487 F. Supp. 329 (N.D. Miss. 1980).

If assignee of lease concerning computers and computer equipment took assignment for value, in good faith and without notice of concurrent agreement that lease, would not be effective if certain acceptable and satisfactory equipment were not delivered, assignee could recover on lease notwithstanding lessor's alleged failure to deliver equipment where lease provided that lessee would not assert against assignee any defenses, counterclaims or offsets which it might have against lessor. *National Bank of N. Am. v. DeLuxe Poster Co.*, 51 A.D.2d 582 (2d Dep't 1976).

In action for breach of warranty by purchaser of new truck against truck dealer, truck manufacturer, and credit company, which was wholly owned subsidiary of manufacturer, where truck was purchased under retail installment contract which was assigned to credit company, where purchaser defaulted on installment contract and credit company filed counter-claim against purchaser seeking recovery of unpaid balance still due and owing on truck, and where installment contract contained provision to effect that purchaser would settle any claim he had with seller and would not set up any such claim against any subsequent holder of contract, under UCC § 9-206(1) purchaser could not assert, as defense against claim of credit company, defect in truck. *Cox v. Galigher Motor Sales Co.*, 158 W. Va. 685, 213 S.E.2d 475 (1975).

The waiver by the lessee of vending machines of any claims that it may have against the lessor is valid. *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. Serv. 858 (1966, NY Sup).

Provisions of a conditional sales contract under which the buyer agreed to settle all claims of any kind against the

seller directly with the seller, and that if the seller assigned the contract he would not use any such claim as a defense, setoff, or counterclaim against any effort by the holder to collect the amount due or to repossess the goods, clearly fall within the purview of this section and are enforceable by the security holder. *Beam v. John Deere Co.*, 240 Ark. 107, 398 S.W.2d 218 (1966).

15. —Good faith.

Stating that "good faith" as used in UCC § 9-206 means more than "honesty in fact", the Civil Court of New York City held that where an assignee sought to bar a consumer from asserting claims and defenses to the underlying obligations and evidence disclosed the assignee had taken the contracts at a discount of 22 percent from face value within 24 hours of their execution and before the seller could possibly have made a credit investigation of the buyer, the assignee had not taken the contract "in good faith" and was not entitled to protection of "cut-off" provisions of § 9206. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290 (1969).

16. —Notice.

Where assignee of retail sales contract involving farm machinery participated in sale by orally affirming seller's promises to buyer, where form of sales contract was furnished by assignee and where it was executed and assigned at about same time and upon same instrument, assignee did not take assignment without notice of claim or defense and was not entitled to enforcement protection provided by UCC § 9-206(1). *Massey-Ferguson Credit Corp. v. Brown*, 169 Mont. 396, 547 P.2d 846 (1976).

Motion of assignee of conditional sales contract for summary judgment would be denied notwithstanding that an agreement by a buyer that he would not assert against an assignee defenses he has against the seller is enforceable by an assignee who takes his assignment for value, in good faith, and without notice of a claim or defense, where the conditional buyer had denied that the assignee took the assignment without notice of his claims against the conditional seller.

McCoy v. Mosley Mach. Co., 33 F.R.D. 287 (D. Ky. 1963).

17. —Relation of assignee to seller.

While Maryland recognizes the “close connectedness doctrine”, there was no showing that credit company had a substantial voice in, or control of, or a vested interest in, the underlying transaction which would destroy good faith and render agreement unenforceable under UCC § 9-206(1), although (1) credit company prepared and supplied sales contract forms to the seller; (2) credit company permitted its name to be displayed for advertising purposes in seller’s place of business; (3) credit company was aware of some complaints about the seller; and (4) credit company acquired about 2,500 such contracts from the seller in each of the last three years. *Block v. Ford Motor Credit Co.*, 286 A.2d 228, 63 A.L.R.3d 1 (D.C. 1972).

A buyer who executes a conditional sales contract containing covenant not to assert against an assignee any defense, counterclaim or offset on account of breach of warranty or otherwise is bound by its agreement and the fact that the assignee is a subsidiary of the assignor seller is not sufficient to cast doubt upon assignee’s status as a bona fide purchaser for value. *B.W. Acceptance Corp. v. Richmond*, 46 Misc. 2d 447 (1965).

18. —Particular applications.

In action by assignee of computer-equipment lease for rent due under lease, (1) although applicable provisions of UCC Article 2 should be applied to equipment leases, entire article would not be applied on theory that equipment lease is transaction in goods under UCC § 2-102; (2) lease in issue was not unconscionable under UCC § 2-302, since it conferred rights and imposed duties on both lessor and lessee, and parties to lease had virtually equal bargaining power; (3) language in lease disclaiming implied warranties of merchantability and fitness were sufficiently conspicuous under UCC § 2-316(2); and (4) since defense that plaintiff was not assignee in good faith within meaning of UCC § 9-206(1) presented fact issue that could not be resolved solely as issue of law, trial court erred in dismissing

defendant’s amended answer on ground that it raised insufficient defense as matter of law. *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance*, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1st Dist. 1977).

In action by bank as seller’s assignee against buyer of motor home upon default in payments, agreement by buyer not to assert defenses against seller’s assignee was binding on buyer under UCC § 9-206(1), where bank took assignment from seller in good faith and without notice of any claim or defense, buyer made payments for almost one year without notifying bank of any defect, bank did not maintain close relationship as financier with seller when contract was purchased, and bank was not closely connected with seller’s business operations. *Are v. Barnett Bank*, 330 So.2d 250 (Fla. App. 1976).

In action by assignee of retail installment contracts, waiver of defenses clause in contract signed by purchasers was effective where assignee purchased contract for value, in good faith, and without notice of any claim or defense. Although retail installment contracts are not negotiable instruments within meaning of UCC § 3-104, standards set forth in UCC § 9-206(1) relating to such instruments are equally applicable in determining whether assignee is entitled to protection of waiver of defense clause. *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (5th Dist. 1976).

Buyer of equipment covered by purchase money security interest could not assert defenses of breach of warranty and failure of consideration against seller’s assignee where, after default, assignee repossessed and sold equipment and brought action for balance due on contract, and where contract contained provisions disclaiming warranties and waiving defenses against assignees: (1) provision disclaiming warranties was not unconscionable within meaning of UCC § 2-302; (2) provision waiving defenses against assignees was not unconscionable and, in fact, was expressly authorized by UCC § 9-206(1); (3) evidence that assignee paid full value for note, that at time of assignment assignee had no knowledge that equipment was defective, that none

of seller's employees or officers were officers or employees of assignee and that seller and assignee were two separate and distinct companies, established assignee's right to enforce provision waiving defenses and, since defenses raised by buyer

could not be raised against holder in due course, they could not be raised by buyer in present action. *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail instalment contracts. 10 A.L.R.2d 447.

Estoppel of obligor to assert against transferee of conditional sales contract, instalment improvement or repair contract, or related commercial paper, defenses or equities available against transferor. 44 A.L.R.2d 196.

Am Jur. 6 Am. Jur. 2d, Assignments § 85.

69 Am. Jur. 2d, Secured Transactions §§ 328 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:241-9:244 (agreement not to assert defenses against assignee; modification of sales warranties).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3471 et seq (agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists).

CJS. 79 C.J.S., Secured Transaction §§ 130 et seq.

§ 75-9-404. Rights acquired by assignee; claims and defenses against assignee.

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor

against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health-care-insurance receivable.

SOURCES: Former 1972 Code § 75-9-404 [Codes, 1942, § 41A:9-404; Laws, 1966, ch. 316, § 9-404; Laws, 1977, ch. 452, § 27; Laws, 1978, ch. 401, § 1; Laws, 1985, ch. 381, § 2, eff from and after July 1, 1985] is now found in comparable provisions enacted at § 75-9-513 by Laws, 2001, ch. 495, § 1. Present § 75-9-404 was derived from former 1972 Code § 75-9-318 [Codes, 1942, § 41A:9-318; Laws, 1966, ch. 316, § 9-318; Laws, 1977, ch. 452, § 23, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Assignment of security interest in motor vehicle, see § 63-21-47.

Delegation of performance by assignment of sales contract, see § 75-2-210(4)(5).

Assignment of letters of credit, see § 75-5-116.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(1).

A. In General.

6. Generally.
7. Contract rights (prior to 1977 Amendment).

B. Defenses Against Assignee.

8. In general.
9. Waiver.
10. Contract terms, claims, and defenses.
11. Defenses accruing prior to notice.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(1).

A. In General.

6. Generally.

Under UCC § 9-318(4), contract which prohibits assignment of money due thereunder or to become due is ineffective to prevent creation of security interest, under Article 9, for purpose of extending credit. *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056 (Miss. 1982).

Contention that bank, by enforcing its security interest in proceeds of debtor's

construction contract with third person, assumed responsibility for performance of such contract under UCC § 9-318(1)(a) was not sustainable where bank, which had set off contract proceeds deposited by debtor in general account with bank against debt owed by debtor, exercised such right of setoff not under its security interest but pursuant to its common-law right, as supplemented by provision in note evidencing debtor's obligation to bank. *Cherokee Carpet Mills, Inc. v. Worthen Bank & Trust Co.*, 262 Ark. 776', 561 S.W.2d 310 (1978).

In buyer's action against assignee of note and security agreement, executed by buyer in purchase of mobile home, for damages for breach of implied warranties attaching to home, even assuming that buyer did not make enforceable agreement not to assert against assignee any defenses or claims arising out of such sale that buyer might have against seller, buyer still could not base cause of action for affirmative relief on UCC § 9-318(1)(a), since such section does not create cause of action for money damages against assignee of commercial paper. *Anderson v. Southwest Sav. & Loan Ass'n*, 117 Ariz. 246, 571 P.2d 1042, 22 U.C.C. Rep. Serv. 1275 (Ct. App. 1977) (rejecting buyer's contention that phrase "subject to" in UCC § 9-318(1) a) transformed assign-

ee's right to receive installment payments from buyer into liability for breach-of-warranty claims that buyer allegedly had against dealer which sold mobile home to buyer).

Purpose of UCC § 9-318(3) is not to identify or limit collateral that might be made subject of valid assignment, but to clarify right of account debtor to continue to make payments directly to assignor until receipt by account debtor of notice or direction to make future payments directly to assignee, notwithstanding fact that account debtor may have had prior notice or knowledge that collateral had been assigned. *Valley Nat'l Bank v. Flagstaff Dairy*, 116 Ariz. 513, 570 P.2d 200 (Ct. App. 1977).

Since "claim" within UCC § 9-318(1) includes set-offs and counterclaims, where assignee obtains money which assignor could only retain upon performance of a contract, and where assignor failed to perform the contract, the assignee cannot retain mistaken, or even negligent, payments made to it by the debtor unless there has been a subsequent change of position by the assignee; there was no such change of position here where assignee had made no further loans on basis of payments received. *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972).

Uniform Commercial Code § 9-318 and § 9-106 are apparently limited to instances of assignments of executory contracts. *Gramatan Co. v. D'Amico*, 50 Misc. 2d 233 (1966).

7. Contract rights (prior to 1977 Amendment).

"Contract right" is a right to be earned by future performance under an existing contract. Contract rights may be regarded as potential accounts, and they become accounts as performance is made under the contract. Recognition of a contract right as collateral in a security transaction makes clear that UCC Article 9 rejects any lingering common-law notion that only rights already earned can be assigned. In most situations, the same rules apply to both accounts and contract rights. *First Nat'l Bank v. Mountain States Tel. & Tel. Co.*, 91 N.M. 126, 571 P.2d 118, 22 U.C.C. Rep. Serv. 1278, 100

A.L.R.3d 1212 (1977) (holding, where party to work contract assigned right to payment before work was performed, that other party to contract was account debtor within meaning of UCC § 9-318(3)).

The right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable; this well-settled principle under the law of assignments has been codified in UCC § 9-318(4). *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972).

B. Defenses Against Assignee.

8. In general.

Under subsection (1)(a), of the instant section the rights of an assignee are subject to any defense or claim arising out of the contract between the assignor and the account debtor, regardless of notice. *Fall River Trust Co. v. B.G. Browdy, Inc.*, 346 Mass. 614, 195 N.E.2d 63 (1964).

9. Waiver.

Where financier-assignee did not take assignment of retail installment contract in good faith, purchaser was not precluded from raising certain defenses under the installment contract which provided for waiver of defenses against assignee. *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452, 54 A.L.R.3d 1210 (Fla. App. 1972), cert. denied, 267 So. 2d 833 (Fla. 1972).

10. Contract terms, claims, and defenses.

In an action by a bank seeking a deficiency judgment under an installment loan agreement for the purchase of a Jeep vehicle, the borrowers were entitled to assert their breach of warranty defense under § 75-9-318. *Jones v. Deposit Guar. Nat'l Bank*, 427 So. 2d 97 (Miss. 1983).

In action by assignee of retail-installment contract for sale of new jeep for deficiency judgment following assignee's repossession sale of jeep, debtor-purchasers, who had valid breach-of-warranty defense against seller because jeep's defects occurred while it was still within its express-warranty period, could assert such defense against assignee under UCC § 9-318(1)(a) because they had not waived it under UCC § 9-206(1). *Jones v. Deposit*

Guar. Nat'l Bank, 427 So. 2d 97 (Miss. 1983).

Under UCC § 9-318(4), contract which prohibits assignment of money due thereunder or to become due is ineffective to prevent creation of security interest, under Article 9, for purpose of extending credit. *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056 (Miss. 1982).

In action on cross-complaint by owner and general contractor on apartment-building project against subcontractor and bank, which was subcontractor's creditor, for loss incurred as result of subcontractor's failure to pay materialmen, where evidence showed (1) that owner-general contractor had made adequate progress payments during building's construction, which were sufficient to enable subcontractor to pay its materialmen, (2) that such payments had been made by checks payable jointly to subcontractor and defendant bank, (3) that bank had loaned money to subcontractor and had taken assignment of subcontractor's right to receive progress payments, (4) that bank had sent each progress-payment application of subcontractor to owner-general contractor, (5) that subcontractor had falsely certified on each application that all bills for labor and materials covered by earlier progress payments had been paid, (6) that owner-general contractor had had no knowledge of subcontractor's failure to pay materialmen, and (7) that bank had cashed progress-payment checks and applied part of the money to subcontractor's indebtedness to bank, court held with regard to application of UCC § 9-318(1)(a), which provides that rights of assignee (bank) are subject to all terms of contract between account debtor (owner-general contractor) and assignor (subcontractor) and to any defense or claim arising from such contract, (1) that owner-general contractor was entitled to recover amount that bank had applied against its loans to subcontractor, and (2) that although owner-general contractor had been remiss in not verifying subcontractor's representations that it had paid all materialmen, bank had been even more remiss, since it had not been an innocent recipient of the progress pay-

ments, but had had good reasons to doubt subcontractor's representations that materialmen had been paid. *Benton State Bank v. Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978).

In action by assignee of book account, arising out of sale of toys by seller to defendant buyer, to collect balance due under such sale, where (1) evidence showed that defendant's purchase agreement contained provision guaranteeing that there would be no drop in price of toys sold to defendant for period of twelve months, and (2) defendant claimed that when seller went out of business and plaintiff assignee held distress sale of seller's remaining inventory, such sale violated no-drop-in-price provision of defendant's contract and entitled him to setoff against balance due on account receivable, court held (1) that distress sale violated seller's agreement with defendant, (2) that under UCC § 9-318(1)(a), rights of plaintiff assignee of the account were subject to defendant's contract defenses or claims, (3) that it was immaterial whether such defenses or claims arose before or after seller notified defendant of the assignment, and (4) that since plaintiff's liquidation of seller's inventory at prices below those fixed in defendant's purchase order constituted a breach of the no-drop-in-price clause in the contract, plaintiff's claim was subject to claim of defendant that arose out of such breach. *James Talcott, Inc. v. H. Corenzwit & Co.*, 76 N.J. 305, 387 A.2d 350 (1978).

Under UCC § 9-318(1)(a), rights of assignee of account receivable are subject to contract defenses or claims of account debtor arising by virtue of terms of contract out of which the receivable was created. In such case, it is immaterial whether such defenses or claims arose before or after notice of the assignment. *James Talcott, Inc. v. H. Corenzwit & Co.*, 76 N.J. 305, 387 A.2d 350 (1978).

In action by assignee for balance due on sales contract involving trade-in of defendant's combine for combine owned by seller and assignor of such contract (defunct implement dealer), where evidence showed that defendant traded in his combine to assignor; that contract was concurrently executed and assigned to plaintiff;

that at time contract was entered into and assigned, both assignor and assignee made certain representations to defendant concerning combine that defendant received under contract; that in violation of such representations, assignor and assignee failed to perform required repair work on combine received by defendant, and that they ultimately took possession of such combine and thereby repudiated the sales contract; and that combine that defendant traded in was not returned to him, defendant could recover on counterclaim against plaintiff-assignee value of combine defendant had traded in, in addition to being absolved from making any payments on the contract, because (1) under UCC § 9-318(1), rights of assignee of contract rights are subject to all terms of contract between account debtor and assignor, and also to any defense or claim arising therefrom; (2) term "claim" includes setoffs and counterclaims; (3) in present case, plaintiff was more than mere assignee accepting right to payments under a contract, since plaintiff had participated in making the sale by orally affirming seller's promises to defendant and contract was concurrently executed and assigned to plaintiff; and (4) had plaintiff not taken assignment under such circumstances, UCC § 9-317 would have applied, and defendant's recourse would only have been against defunct assignor for indebtedness arising out of contract. *Massey-Ferguson Credit Corp. v. Brown*, 173 Mont. 253, 567 P.2d 440 (1977).

Where buyer of new pickup truck sued dealer, manufacturer, and credit company to which buyer's instalment-purchase contract had been assigned for damages for breach of warranty and credit company counterclaimed for balance due on purchase price, rights of credit company were subject under UCC § 9-318 to all terms of contract between buyer and dealer, including any defenses arising from such contract, since buyer had not agreed pursuant to UCC § 9-206 not to assert any claims or defenses against credit company and language of contract did not prevent buyer from asserting defense of breach of express warranty. However, although evidence sustained defense of breach of express warranty, such defense was not com-

plete bar to credit company's counterclaim for balance due on purchase price but could only be used under UCC § 2-717 as setoff against balance due, since buyer at time of suit had driven vehicle approximately 49,000 miles and had not rejected acceptance of vehicle or properly revoked acceptance thereof under the Uniform Commercial Code. *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977).

Claim to which assignee is subject under UCC § 9-318 includes set-off, regardless of whether it has any connection with assertion in assignee's complaint. *Investment Serv. Co. v. North Pac. Lumber Co.*, 261 Or. 43, 492 P.2d 470 (1972).

An assignee of a contract for the sale of lumber is subject to any setoff the purchaser of the lumber might have because of a defect in the lumber sold, and under UCC § 9-318 the setoff is available for use against any claim made by the assignee regardless of whether it has any connection with the claim asserted in the assignee's complaint. *Investment Serv. Co. v. North Pac. Lumber Co.*, 261 Or. 43, 492 P.2d 470 (1972).

Assignee of contract rights is subject to all equities and defenses which could have been raised by debtor against assignor, with exception of those claims and defenses which are both unrelated to underlying contract and arise after debtor is notified of assignment. *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972).

11. Defenses accruing prior to notice.

Setoff arising out of separate transaction subsequent to assignment notification could not bind assignee. *Ertel v. Radio Corp. of Am.*, 261 Ind. 573, 307 N.E.2d 471 (1974), on remand, 171 Ind. App. 51, 354 N.E.2d 783 (1976).

In action by assignee of transportation company for balance due under contract with State Park Commission, state, as "account debtor," was entitled to assert claim against transportation company for uncollected withholding taxes which became due before state had notice of assignment. *Central State Bank v. State*, 73 Misc. 2d 128 (1973).

Where corporation paid note signed by corporation president but not by corporation, corporation acquired rights of trans-

feree and could not enforce note against maker until date when it could have been enforced by transferor; so that corporation as account debtor was not entitled to set-off, since it had had notification of assignment of accounts more than 3 months before claim against assignor on note accrued. *Commercial Sav. Bank v. G & J Wood Prods. Co.*, 46 Mich. App. 133, 207 N.W.2d 401 (1973).

In action by assignee of account, where account debtor raised defense based on assignor's alleged breach of contract out of which assigned debt arose and counterclaim predicated on apparently unrelated, unpaid loan, notice of assignment would only have relevance to counterclaim and not to defense, because only claims arising independently of contract between account debtor and assignor which accrue after notification are cut off thereby. *Gateway Nat'l Bank v. Saxe, Bacon & Bolan*, 40 A.D.2d 653 (1st Dep't 1972).

Term "accrue" as used in Code § 9-318(1) refers to time when cause of action exists, and buyer of plywood was not entitled to setoff against amount due assignee of invoice damages caused by breaches of contract by seller of plywood on orders not included in assigned invoice, where breaches of contract occurred after assignment of invoice and notification to buyer of assignment. *Seattle-First Nat'l Bank v. Oregon Pac. Indus., Inc.*, 262 Or. 578, 500 P.2d 1033 (1972).

Whether an account debtor may set up against an assignee a defense not arising out of the contract between the assignor and the account debtor depends, under subsection (1)(b) of the instant section, on whether the account debtor's claim accrued before the debtor received notice of the assignment. *Fall River Trust Co. v.*

B.G. Browdy, Inc., 346 Mass. 614, 195 N.E.2d 63 (1964).

Where a corporation (account debtor) delivered goods to another corporation (assignor) for dyeing and finishing of the goods, and the assignor assigned accounts receivable to a bank (assignee) to secure it for money advanced to the assignor, where the assignor was adjudicated a bankrupt, where the assignee sought to recover on the assigned accounts against the account debtor, and where the latter set up the defense that it had delivered to the assignor goods of a value in excess of the amount sought to be recovered by the assignee, which goods had not been returned, it was held that the case was governed by subsection (1) of the instant section, that if the missing goods were processed under the contract which gave rise to the assigned accounts the rights of the assignee, under subsection (1) of the instant section would be subject to any defense or claim arising from the terms of the bailment contract between the assignor and the account debtor regardless of notice and that it would make no difference when the assignee gave the account debtor notice of the assignment, but that if the missing goods were other than those on which the accounts arose the rights of the parties would be governed by subsection (1)(b) of the instant section, and whether the assignee's rights would be subject to the account debtor's claim would hinge on whether debtor's claim accrued before it received notice of the assignments. Inasmuch as the record before the appellate court failed to show what the necessary facts were, the case was remanded for a determination of such facts. *Fall River Trust Co. v. B.G. Browdy, Inc.*, 346 Mass. 614, 195 N.E.2d 63 (1964).

RESEARCH REFERENCES

ALR. Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts. 10 A.L.R.2d 447.

Validity of anti-assignment clause in contract. 37 A.L.R.2d 1251.

"Insecurity" acceleration or reposses-

sion clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage is subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 8.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, or provision waiving, as against assignee, defenses good against seller. 39 A.L.R.3d 518.

Construction and operation of UCC § 9-318(3) providing that account debtor is authorized to pay assignor until he receives notification to pay assignee. 100 A.L.R.3d 1218.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 20, 24, 53, 77, 80, 84, 85.

13 Am. Jur. 2d, Buildings and Construction Contracts § 100.

68A Am. Jur. 2d, Secured Transactions §§ 538 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:591-9:594, 9:601-9:603 (assignment of account).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3591 et seq. (assignment by secured party).

CJS. 6A C.J.S., Assignments §§ 64, 73 et seq.

79 C.J.S., Secured Transactions § 316.

78 C.J.S., Sales §§ 134 et seq.

§ 75-9-405. Modification of assigned contract.

(a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d).

(b) Subsection (a) applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under Section 75-9-406(a).

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) This section does not apply to an assignment of a health-care-insurance receivable.

SOURCES: Former 1972 Code § 75-9-405 [Codes, 1942, § 41A:9-405; Laws, 1966, ch. 316, § 9-405; Laws, 1968, ch. 491, § 1; Laws, 1977, ch. 452, § 28; Laws, 1985, ch. 381, § 3, eff from and after July 1, 1985] is now found in comparable provisions enacted at §§ 75-9-514 and 75-9-519 by Laws, 2001, ch. 495, § 1. Present § 75-9-405 was derived from former 1972 Code § 75-9-318 [Codes, 1942, § 41A:9-318; Laws, 1966, ch. 316, § 9-318; Laws, 1977, ch. 452, § 23, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Assignment of security interest in motor vehicle, see § 63-21-47.

Delegation of performance by assignment of sales contract, see § 75-2-210(4)(5).

Assignment of letters of credit, see § 75-5-116.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(2).

A. Modification or Substitution.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(2).

A. Modification or Substitution.

6. In general.

In cross-action by assignee of contract, who as security for loan had been assigned proceeds of assignor's contract to furnish cross-defendant all paper cores used in cross-defendant's business, for cross-defendant's failure to honor such assignment, court held that (1) plaintiff assignee was not bound by account stated between assignor and cross-defendant, since some items that might properly be set off as

between assignor and cross-defendant could not properly be deducted by cross-defendant from contract proceeds owed to assignee, (2) cross-defendant's purchase of core paper to enable assignor to perform contract, and also rent deductions made by cross-defendant to assignor, were under UCC § 9-318(2) commercially reasonable modifications of contract between assignor and cross-defendant, (3) amounts deducted by cross-defendant for rent and core paper should therefore be credited against amount owed by cross-defendant to assignee, and (4) cross-defendant was not entitled to deductions for sums that it had paid into court in certain garnishment proceedings, since debts involved in such proceedings did not arise out of the assigned contract and their payment could not be said to be a proper modification of such contract under UCC § 9-318(2). *Madden Eng'g Corp. v. Major Tube Corp.*, 568 S.W.2d 614 (Tenn. Ct. App. 1977).

RESEARCH REFERENCES

ALR. Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts. 10 A.L.R.2d 447.

Validity of anti-assignment clause in contract. 37 A.L.R.2d 1251.

"Insecurity" acceleration or repossession clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage is subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 8.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, or provision waiving, as against assignee, defenses good against seller. 39 A.L.R.3d 518.

Construction and operation of UCC § 9-318(3) providing that account debtor is

authorized to pay assignor until he receives notification to pay assignee. 100 A.L.R.3d 1218.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 20, 24, 53, 77, 80, 84, 85.

13 Am. Jur. 2d, Buildings and Construction Contracts § 100.

68A Am. Jur. 2d, Secured Transactions §§ 538 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:591-9:594, 9:601-9:603 (assignment of account).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3591 et seq. (assignment by secured party).

CJS. 6A C.J.S., Assignments §§ 64, 73 et seq.

79 C.J.S., Secured Transactions § 316.

78 C.J.S., Sales §§ 134 et seq.

§ 75-9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

(a) Subject to subsections (b) through (i), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) Subject to subsection (h), notification is ineffective under subsection (a):

(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

(c) Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

(d) Except as otherwise provided in subsection (e) and Sections 75-2A-303 and 75-9-407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a

default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Subsection (d) does not apply to the sale of a payment intangible or promissory note.

(f) Except as otherwise provided in Sections 75-2A-303 and 75-9-407 and subject to subsections (h) and (i), a rule of law, statute or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subject to subsection (h), an account debtor may not waive or vary its option under subsection (b)(3).

(h) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) This section does not apply to an assignment of a health-care-insurance receivable.

(j) This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section, and states that the provision prevails over this section.

SOURCES: Former 1972 Code § 75-9-406 [Codes, 1942, § 41A:9-406; Laws, 1966, ch. 316, § 9-406; Laws, 1977, ch. 452, § 29; Laws, 1985, ch. 381, § 4, eff from and after July 1, 1985] is now found in comparable provisions enacted at § 75-9-512 by Laws, 2001, ch. 495, § 1. Present § 75-9-406 was derived from former 1972 Code § 75-9-318 [Codes, 1942, § 41A:9-318; Laws, 1966, ch. 316, § 9-318; Laws, 1977, ch. 452, § 23, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Assignment of security interest in motor vehicle, see § 63-21-47.

Delegation of performance by assignment of sales contract, see § 75-2-210(4)(5).

Assignment of letters of credit, see § 75-5-116.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(3), (4).

A. Notice of Assignment.

6. In general.
7. Service and proof of notice.
8. Sufficiency of notice.
9. Proof of assignment.

B. Contract Terms Restricting Assignment.

10. In general.
11. Consent provision; invalid.
12. —Valid.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-318(3), (4).

A. Notice of Assignment.

6. In general.

UCC § 9-318(3) reiterates pre-Code rule that payment by debtor to his original creditor protects debtor against assignee of the debt, unless debtor has notice of the assignment. *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 260 N.W.2d 680 (1978).

UCC § 9-318(3) is intended to protect debtor, in situation where original creditor has assigned his security interest, by providing that debtor will not be held in default if he pays original creditor before receiving notice that original creditor has assigned his security interest. UCC § 9-318(3) does not apply to situation where debtor himself is would-be "assignor" who attempts to free from creditor's security interest sums due debtor merely by arranging to have such sums paid directly to another. *Northwestern Nat'l Bank S.W. v. Lectro Sys.*, 262 N.W.2d 678 (Minn. 1977).

UCC § 9-318(3) establishes no specific requirements as to the form of, or the language to be used in, the notice of assignment of an account. The section provides only that a notification that does not reasonably identify the rights assigned is ineffective. However, what is "reasonable"

is not left to the arbitrary decision of the account debtor. If there is doubt as to the adequacy of either the notification or the proof submitted as to the making of the assignment, the account debtor may not be safe in disregarding the notification or proof, unless he has notified the assignee with commercial promptness of the respects in which the identification or proof is considered defective. *First Nat'l Bank v. Mountain States Tel. & Tel. Co.*, 91 N.M. 126, 571 P.2d 118, 22 U.C.C. Rep. Serv. 1278, 100 A.L.R.3d 1212 (1977) (holding that account debtor could readily determine from assignment form in suit that assignee had purchased assignor's right, title, and interest in proceeds of work contract with account debtor and that assignee was therefore entitled to be paid such proceeds).

In *Department of Labor & Industry v. Asbury Metropolitan Hotel Co.* (1963) 80 NJ Super 486, 194 A2d 244, 1 UCCRS 577 an action by a state agency to recover penalties for an employer's alleged violation in honoring assignment of wages by certain of his employees to an employment agency, the court stated that if the assignments of wages were valid and notice thereof had been given to the employer, he would have been legally obligated under general law of assignability to pay over the sums assigned to the assignee, and that failure to do so under this basic law of contracts would make him personally liable to the assignee, citing subsection (3) of the instant section. *Department of Labor & Indus. v. Asbury Metro. Hotel Co.*, 80 N.J. Super. 486, 194 A.2d 244 (App. Div. 1963).

7. Service and proof of notice.

Failure of bankrupt assignor to list debt owed by account debtor on assignor's schedule of assets did not constitute fraud in bankruptcy proceeding where assignor under UCC § 9-318(3) had no right to receive payment after assignment of account and account debtor had been given notification of such assignment. *United States v. Moynagh*, 566 F.2d 799 (1st Cir. Mass. 1977), cert. denied, 435 U.S. 917, 98 S. Ct. 1475, 55 L. Ed. 2d 510 (1978).

Account debtor did not receive notice of assignments made by its creditor to bank where, *inter alia*, notice was given to employee of debtor who was not in such position that notice to him could reasonably be construed to be notice to debtor. *Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 534 P.2d 887 (Utah 1975).

Where creditor with perfected security interest in debtor's accounts and contract rights brought action against state to recover money held by state on account for debtor in payment for certain survey and design work performed for state by debtor, and where state claimed right to set off unpaid withholding taxes and unemployment insurance contributions owed by debtor to state: (1) Under UCC § 9-318, state was account debtor and, thus, secured creditor was subject to any defense or claim that state had against debtor before state received notification of assignment of account; (2) Secured party's filing of financing statement with department of state did not constitute actual notice to state of such assignment and, thus, state's right to assert claims for unpaid taxes and unemployment insurance was not cut off until secured party made demand on state controller for money due to debtor. *Chase Manhattan Bank v. State*, 48 A.D.2d 11 (3d Dep't 1975), *aff'd*, 40 N.Y.2d 590, 388 N.Y.S.2d 896, 357 N.E.2d 366 (1976).

Evidence supported finding of notification of assignment within UCC § 9-318(3) where invoices were mailed in envelopes with return address and were not returned and where check used to pay invoice bore invoice number notation in lower left corner. *Taubenhaus v. Jung Factors, Inc.*, 478 S.W.2d 149 (Tex. Civ. App. 1972).

8. Sufficiency of notice.

Account debtor did not receive sufficient notice of assignment of account and therefore was authorized to continue making payments to assignor, under § 75-9-318(3), where account debtor, who was farmer, was shown letter describing assignment while out in rice field without his reading glasses, and he signed it with

understanding that it was routine account verification, where account debtor was not given copy of letter, where letter neither explicitly stated that account had been assigned nor identified which of account debtor's corporate accounts with assignor was involved, and where, over course of one year or more, account debtor's corporations paid over \$50,000 to assignor by checks made payable solely to assignor, and assignee never complained during this period about way payments were made. *Warrington v. Dawson*, 798 F.2d 1533 (5th Cir. 1986).

Letter from assignee of contract for manufacture of hydraulic valves to assignor's account debtor, which requested account debtor to make payments due under such contract to assignee but which did not identify contract by date or type of product contracted for, was not sufficient notice of such assignment under UCC § 9-318(3). *Progressive Design, Inc. v. Olson Bros. Mfg. Co.*, 200 Neb. 291, 263 N.W.2d 465 (1978).

Under UCC § 9-318, notice at bottom of each invoice sent by contractor to debtor indicating that checks should be made payable to named bank and named contractor was not sufficient as a matter of law to put debtor on notice that contractor's right to payment was assigned to bank, where the notation did not reasonably identify any rights existing in bank and debtor received invoices before contractor made assignment to bank. *Citizens State Bank v. J.M. Jackson Corp.*, 537 S.W.2d 120 (Tex. Civ. App. 1976).

Notice of assignment which was sent by registered mail and received by account debtor at its shipping dock was sufficient, although it never reached account debtor's accounting department. *Ertel v. Radio Corp. of Am.*, 261 Ind. 573, 307 N.E.2d 471 (1974), on remand, 171 Ind. App. 51, 354 N.E.2d 783 (1976).

Under UCC §§ 9-502 and 9-318(3), account debtor was under obligation to make payment to assignee to whom creditor had assigned all of its accounts receivable, instead of making payment directly to creditor, where assignee sent account debtor registered letter that notified

debtor that assignee held security agreement with creditor covering all of creditor's accounts receivable and inventory and demanding payment of all monies due to creditor, notwithstanding that at time assignee sent its notice, account debtor's obligation to creditor was not "account" receivable of creditor, in that account debtor had not received creditor's performance which would obligate debtor to make payment. *Marine Nat'l Bank v. Airco, Inc.*, 389 F. Supp. 231 (W.D. Pa. 1975).

Merely authorizing payment of stated sum to particular person cannot be considered as notification that such sum had been assigned to individual to whom payment was authorized. *S & W Trucks, Inc. v. Nelson Auction Serv., Inc.*, 80 N.M. 423, 457 P.2d 220 (Ct. App. 1969).

9. Proof of assignment.

In action for conversion of milk and sale proceeds thereof, where (1) perfected security agreement covering contract for sale of cows and dairy equipment provided that secured party would have lien on all milk produced by cows, that all milk should be sold by defendant who was not party to sales contract, and that defendant should pay specified monthly sum from proceeds of such sales to secured party, and (2) where defendant notified secured party that authorization to pay contained in security agreement was not acceptable as assignment of sales proceeds and requested secured party to memorialize such agreement on forms acceptable to defendant, but secured party never complied with such request, court would hold (1) that under UCC § 9-306(2), authorization in security agreement for sale of milk (collateral) waived any interest of secured party in proceeds of collateral; (2) under UCC § 9-318(3), defendant had right to make reasonable request that secured party furnish proof of assignment of proceeds of sales; and (3) since such proof was never furnished, no assignment was ever made. *Raley v. Milk Producers, Inc.*, 90 N.M. 720, 568 P.2d 246 (Ct. App. 1977), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

B. Contract Terms Restricting Assignment.

10. In general.

Under UCC § 9-318(4), contract which prohibits assignment of money due thereunder or to become due is ineffective to prevent creation of security interest, under Article 9, for purpose of extending credit. *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056 (Miss. 1982).

Under the Mississippi Uniform Commercial Code any contract which prohibits the assignment of money due or to become due thereunder is ineffective to prevent the creation of a security interest for the purpose of extension of credit under Chapter 9. *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056 (Miss. 1982).

Where (1) debtor at time it borrowed \$250,000 from bank purchased \$13,000 certificate of deposit which was nonnegotiable and nonassignable unless assignment was consented to and recorded on bank's books, (2) bank's customer contract with debtor authorized it to apply debtor's account, whether savings or certificate of deposit, to any indebtedness due bank from debtor, (3) debtor without bank's consent or knowledge assigned certificate to indemnity company to provide collateral for bond that debtor purchased from such company, (4) indemnity company thereafter sent certificate to bank with request for payment, and (5) bank, which had not changed its position in reliance on such certificate, thereupon set off funds represented by certificate against debt owed by debtor and demanded that balance of debt be paid, federal court in absence of clearly controlling precedents in decisions of Florida Supreme Court would certify following questions to such court: (1) Was assignment of certificate of deposit as security for purchase of bond a transfer that was entitled to secured-transaction treatment under Florida UCC Art 9? (2) Was such transaction excluded from coverage under Florida UCC Art 9 by Florida UCC § 9-104(9) (Official UCC § 9-104(i)) or Florida UCC § 9-104(11) (Official UCC § 9-104(k))? (3) Did Florida UCC § 9-318(4) (Official UCC § 9-318(4))

invalidate prohibition against assignment of certificate without bank's consent and notation of assignment on bank's books? (4) Was bank's asserted right of setoff established by Florida UCC § 9-318(1) (Official UCC § 9-318(1))? *Bornstein v. Citizens Nat'l Bank*, 564 F.2d 721 (5th Cir. Fla. 1977).

UCC § 9-318 makes ineffective a term in any contract prohibiting assignment of contract right, i.e. a right to payment. *Macke Co. v. Pizza of Gaithersburg, Inc.*, 259 Md. 479, 270 A.2d 645, 53 A.L.R.3d 461 (1970).

Subsection (4) of the instant section was referred to, for comparison purposes, in *Security Nat. Bank v. General Motors Corp.* (1963) 345 Mass 434, 187 NE2d 820, in connection with the proposition that a prohibition in a contract against the assignment of any rights thereunder was valid and binding on the parties to the contract and on a person purporting to take an assignment of rights under the contract. *Security Nat'l Bank v. GMC*, 345 Mass. 434, 187 N.E.2d 820 (1963).

11. Consent provision; invalid.

UCC § 9-318(4) precludes and invali-

dates provision of college project subcontract requiring approval by general contractor of assignment by subcontractor. *General Elec. Supply Co. v. Epco Constructors, Inc.*, 332 F. Supp. 112 (S.D. Tex. 1971).

A clause of a security agreement seeking to limit right to assign account or contract right to instance where there is approval by creditor is invalid under UCC § 9-318. *General Elec. Supply Co. v. Epco Constructors, Inc.*, 332 F. Supp. 112 (S.D. Tex. 1971).

12. —Valid.

Provisions found in UCC §§ 2-210(2) and 9-318(4), nullifying effects of anti-assignment provisions, had no application to contract for installation of heating and air conditioning systems in apartment complex which contained clause prohibiting assignment of contract "or any part thereof" without written consent of other party, since contract was not one for sale of goods but was for services and labor with incidental furnishing of equipment and materials. *Mingledorff's, Inc. v. Hicks*, 133 Ga. App. 27, 209 S.E.2d 661 (1974).

RESEARCH REFERENCES

ALR. Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts. 10 A.L.R.2d 447.

Validity of anti-assignment clause in contract. 37 A.L.R.2d 1251.

"Insecurity" acceleration or repossession clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage is subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 8.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, or provision waiving, as against assignee, defenses good against seller. 39 A.L.R.3d 518.

Construction and operation of UCC § 9-318(3) providing that account debtor is

authorized to pay assignor until he receives notification to pay assignee. 100 A.L.R.3d 1218.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 20, 24, 53, 77, 80, 84, 85.

13 Am. Jur. 2d, Buildings and Construction Contracts § 100.

68A Am. Jur. 2d, Secured Transactions §§ 538 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:591-9:594, 9:601-9:603 (assignment of account).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3591 et seq. (assignment by secured party).

CJS. 6A C.J.S., Assignments §§ 64, 73 et seq.

79 C.J.S., Secured Transactions § 316.

78 C.J.S., Sales §§ 134 et seq.

§ 75-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.

(a) Except as otherwise provided in subsection (b), a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Except as otherwise provided in Section 75-2A-303(7), a term described in subsection (a)(2) is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of Section 75-2A-303(4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

SOURCES: Former 1972 Code § 75-9-407 [Codes, 1942, § 41A:9-407; Laws, 1968, ch. 492, § 1; Laws, 1977, ch. 452, § 30; Laws, 1985, ch. 381, § 5, eff from and after July 1, 1985] is now found in comparable provisions enacted at § 75-9-523 by Laws, 2001, ch. 495, § 1. Present § 75-9-407 was derived from 1972 Code § 75-2A-303 [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

(c) A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) would be effective under law other than this article but is ineffective under subsection (a) or (c), the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section, and states that the provision prevails over this section.

SOURCES: Former 1972 Code § 75-9-408 [Laws, 1977, ch. 452, § 31, eff from and after April 1, 1978] is now found in comparable provisions enacted at § 75-9-505 by Laws, 2001, ch. 495, § 1. Present § 75-9-408 was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-409. Restrictions on assignment of letter-of-credit rights ineffective.

(a) A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) Would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or

(2) Provides that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.

(b) To the extent that a term in a letter of credit is ineffective under subsection (a) but would be effective under law other than this article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(1) Is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) Imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) Does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

PART 5.

FILING.

Subpart 1. Filing Office; Contents and Effectiveness of Financing Statement.....75-9-501

Subpart 2. Duties and Operation of Filing Office.....75-9-519

Editor’s Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under “Judicial Decisions” were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

SUBPART 1.

FILING OFFICE; CONTENTS AND EFFECTIVENESS OF FINANCING STATEMENT.

SEC.

75-9-501. Filing office.

75-9-502. Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

75-9-503. Name of debtor and secured party.

75-9-504. Indication of collateral.

75-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

75-9-506. Effect of errors or omissions.

75-9-507. Effect of certain events on effectiveness of financing statement.

75-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.

75-9-509. Persons entitled to file a record.

75-9-510. Effectiveness of filed record.

75-9-511. Secured party of record.

75-9-512. Amendment of financing statement.

75-9-513. Termination statement.

75-9-514. Assignment of powers of secured party of record.

75-9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement.

75-9-516. What constitutes filing; effectiveness of filing.

75-9-517. Effect of indexing errors.

75-9-518. Claim concerning inaccurate or wrongfully filed record.

§ 75-9-501. Filing office.

(a) Except as otherwise provided in subsection (b), if the local law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) The collateral is as-extracted collateral or timber to be cut; or

(B) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) The Office of the Secretary of State in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the Office of the Secretary of State. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

SOURCES: Former 1972 Code § 75-9-501 [Codes, 1942, § 41A:9-501; Laws, 1966, ch. 316, § 9-501; Laws, 1977, ch. 452, § 32, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-601 through 75-9-604 by Laws, 2001, ch. 495, § 1. Present § 75-9-501 was derived from former 1972 Code § 75-9-401 [Codes, 1942, § 41A:9-401; Laws, 1966, ch. 316, § 9-401; Laws, 1968, ch. 489, § 1; Laws, 1977, ch. 452, § 24; Laws, 1982, ch. 439; Laws, 1984, ch. 454, § 1; Laws, 1995, ch. 329, § 1, eff from and after July 1, 1995] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Effect of this section on disposition of seized property under Uniform Controlled Substances Law, see § 41-29-177.

Procedure for forfeiture of property seized for violation of fish and game laws, see §§ 49-7-251 et seq.

Application of this section to a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Definitions, see § 75-9-102.

Scope of Article, see § 75-9-109.

Employer's lien on crops of sharecropper, see § 85-7-1.

Recording of deeds and conveyances, see §§ 89-5-1 to 89-5-5.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-401.

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6. Generally; scope.

7. Necessity of filing.

8. —Motor vehicles.

B. Place of Filing.

9. In general.

10. Residence of debtor; farm goods, etc.

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15. —Dual filing.

16. —“Place of business”.

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18. —“Residence” of business.

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C. Mistake as to Place of Filing.

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22. Good faith.

23. Actual knowledge of financing statement.

24. —Knowledge of security agreement distinguished.

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26. Collateral as to which filing proper.

D. Change in Circumstances Controlling Filing.

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E. Decisions Under Former Statutes.

- 29. Decisions under Code 1942 § 863.
- 30. Decisions under Code 1942 § 870.

I. Under Current Law.**1.-5. [Reserved for future use.]****II. Under former § 75-9-401.****A. In General.****6. Generally; scope.**

Financing statements which did not contain correct name of debtor but listed debtor only by tradename used by debtor for his business did not substantially comply with statutory requirement and were fatally defective. *In re Thomas*, 466 F.2d 51 (9th Cir. Cal. 1972).

UCC § 9-401 relates only to the priority of otherwise valid security interests and has no relation to the question of whether there was authority to create a security interest. *Branch v. Steph*, 389 F.2d 233 (10th Cir. Okla. 1968).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

The provisions of this section simply provide a system of notice of a reservation of title to purchasers, creditors, and others, but they do not affect any rights or obligations as between seller and buyer, and noncompliance with them does not, as between the parties, divest the seller's reserved title and vest it in the buyer. *Rodi Boat Co. v. Provident Tradesmens Bank & Trust Co.*, 236 F. Supp. 935 (E.D. Pa. 1964), aff'd, 339 F.2d 259 (3d Cir. Pa. 1964).

Unperfected security interest is subordinate to rights of lien creditors or trustee in bankruptcy representing them. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

In an action by a trustee in bankruptcy to recover for the estate assets taken over by holders of financing contracts, wherein

the contract holders, who had filed financing statements pursuant to the Uniform Commercial Code, defended on the ground that they were secured creditors, mixed questions of fact and law being involved, the matter was too complex to permit solution on motion for a summary judgment, in whole or in part. *Hurwitz v. Fidelity Am. Fin. Corp.*, 179 F. Supp. 550 (E.D. Pa. 1960).

Although signatures of debtors on financing statement appeared to be made in individual capacity rather than as corporate officers, financing statements established valid perfected security interest in bank since it was evident that corporation was in fact debtor on financing statements and ample notice was provided for those making good faith search of official records. *Sherman v. Upton, Inc.*, 90 S.D. 467, 242 N.W.2d 666 (1976).

Liability between the parties is created by the execution of a security agreement or other instrument, but no personal liability is created by the execution of a financing statement. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

7. Necessity of filing.

A lease agreement which provides the lessee, upon compliance with the terms of the lease, with an option to purchase the entire leased premises for a nominal consideration makes the lease one intended for security; in order to perfect a security interest in such an arrangement, appropriate financing statements must be filed. *Peoples Bank & Trust Co. v. Applewhite (In re 20th Century Enters., Inc.)*, 152 B.R. 119 (Bankr. N.D. Miss. 1992).

In action by lender to establish security interest in mobile homes "floor-planned" for dealer, (1) where lender pursuant to written agreement advanced money to dealer in Arizona for inventory financing, agreement gave lender security interest in all of dealer's present and after-acquired inventory, and lender filed financing statement with Arizona Secretary of State; (2) where Alabama manufacturer thereafter orally sold 16 mobile homes to dealer but was not paid therefor, invoice accompanying such homes stated that title thereto could be transferred only through manufacturer's certificate of origin, and manu-

facturer retained all such certificates; (3) where manufacturer did not file financing statement evidencing its interest in such homes with Arizona Secretary of State; and (4) where Arizona motor-vehicle registration code, at time of sale of homes to dealer, exempted them from registration requirement while they were still owned by dealer or manufacturer, plaintiff lender (1) was not required to file financing statement and certificates of title to homes with Arizona motor-vehicle division in order that lender's lien could be indorsed on such certificates and lender's security interest in dealer's inventory could be perfected; (2) lender's security interest in homes was perfected merely by filing financing statement with Arizona Secretary of State pursuant to UCC § 9-302(1) and UCC § 9-401; (3) manufacturer, by retaining title to homes, merely reserved unperfected purchase-money security interest therein under UCC § 2-401; and (4) lender's perfected security interest in homes had priority over manufacturer's unperfected security interest therein under UCC § 9-301. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

8. —Motor vehicles.

In Missouri the filing provisions of this section have no application to motor vehicles and the perfection of liens thereon. *In re Jackson*, 268 F. Supp. 434 (E.D. Mo. 1967), *aff'd*, 385 F.2d 775 (8th Cir. Mo. 1967).

Filing requirements of Georgia Uniform Commercial Code are analogous to requirements for certificate-of-title applications under Georgia Motor Vehicle Certificate of Title Act, since both laws require filing of security interests to give notice to both future creditors of debtor and to potential buyers of collateral involved. *Roberts v. International Harvester Credit Corp.*, 143 Ga. App. 206, 237 S.E.2d 697, 22 U.C.C. Rep. Serv. 1087 (1977).

The holder of a security interest, perfected by the proper filing of a chattel mortgage in the county in which an automobile was purchased and certificate of title was issued, and which remained a perfected interest under the provisions of subdivision 3 of this section as enacted in Wyoming for four months after the security was removed held a lien on the secu-

rity superior to that of a judgment creditor who levied upon the automobile in the second county without knowledge or notice of the chattel mortgage, but did so before expiration of the four-month period following removal. *Slates v. Commercial Credit Corp.*, 412 P.2d 444 (Wyo. 1966).

One engaged in lending money to an automobile dealer who takes a bill of sale, absolute on its face, for the sum of money loaned on a described automobile but fails to file a financing statement under the provisions of this section may lose his security interest either by sale of the automobile in the usual course of business or by the sale of the automobile by the dealer out of the course of business to a bona fide purchaser for value having neither actual nor constructive knowledge of such lien. *Dunford v. Columbus Auto Auction, Inc.*, 114 Ga. App. 407, 151 S.E.2d 464 (1966).

A seller of truck tires on conditional sale, who failed to file notice of his security interest in the tires, could not assert such interest against a third person, the conditional seller of the truck to which the tires were attached whose security interest in the truck was perfected, and who retaken the truck under this section. *Ludlow Rubber Co. v. Mack Truck Sales, Inc.*, 38 Mass. App. Dec. 78 (1967).

B. Place of Filing.

9. In general.

While both the time of filing rule and the time of attachment rule have merit, neither rule furthers the important policy of providing notice to subsequent creditors of the prior existing security interest as well as a rule based upon the last event; by requiring that the determination of the proper place to file be made at the time when the last event occurs upon which the perfection of the creditor's security interest is based, the last event rule insures that the place in which the filing is made and the contents of the filing will reflect any changes made by the debtor between the time of attachment and the time of filing, regardless of which came first. The filer would be more likely to reflect the location and status of the debtor which exists at the time a subsequent creditor is searching the records to determine what prior security interests have been per-

fectured against the debtor and therefore will be more likely to be found by such a subsequent creditor. Accordingly, the secured party must determine the correct place in which to file his financing statement on the basis of the facts existing at the time when the last event necessary for the perfection of his security interests occurs. *Borg-Warner Acceptance Corp. v. Fedders Fin. Corp.*, 614 F.2d 399 (5th Cir. 1980).

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1)(c), and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481, 24 U.C.C. Rep. Serv. 1240 (Miss. 1978).

10. Residence of debtor; farm goods, etc.

In action to determine priority of right to farm equipment (collateral) as between bankruptcy trustee and assignee-creditor with allegedly perfected security interest, where (1) partnership-debtor bought farm equipment from seller on October 25, 1974, (2) seller filed financing statement in Tallahatchie County, Mississippi, instead of Sunflower County, Mississippi, where partnership's property was located, (3) seller subsequently assigned sale contract and security agreement to plaintiff assignee-creditor, and (4) debtor thereafter became bankrupt, court held (1) that partnership can be debtor because (1) UCC § 9-105(1)(d) defines debtor as "person" who owes payment of secured obliga-

tion, (b) "person" under UCC § 1-201(30) includes "organization," and (c) "organization" under UCC § 1-201(28) includes "partnership," (2) that debtor-partnership's residence under UCC § 9-401(6) was its place of business, which was in Sunflower County, Mississippi, and not Tallahatchie County, Mississippi, (3) that under UCC § 9-401(1)(a), plaintiff's financing statement should have been filed in county of debtor's residence (Sunflower County), and (4) that as a result, plaintiff's security interest was unperfected because it was filed in wrong county. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. Tenn. 1982).

Security interest need not be perfected under UCC in order to be protected against subsequent judgment lien under Section 6323(h)(1) of Federal Tax Lien Act and thus creditor's security interest in debtor's popcorn crop was not primed by federal tax lien merely because creditor failed to file financing statement in county where debtor resided as required by UCC § 9-401(1)(a). *Dragstrem v. Obermeyer*, 549 F.2d 20 (7th Cir. Ind. 1977).

11. —Additional filing as to crops.

Filing of financing statement relating to security interest in soybeans was properly made in county in which debtor resided and in which land on which soybeans were to be grown was situated, and such filing precluded claim that soybeans were purchased from debtor without knowledge or notice of security interest therein. *United States v. Hughes*, 340 F. Supp. 539 (N.D. Miss. 1972).

12. —Consumer goods.

A chattel mortgage of an automobile filed where the car was located and the mortgagor resided is valid as against mortgagor's trustee in bankruptcy even though instrument was not recorded in the locality to which mortgagor removed taking the chattel, both under existing statutes and the Commercial Code. In *re Mohammed*, 327 F.2d 616 (6th Cir. Mich. 1964).

13. Real property records.

County's recordation of lease purchase agreement in land records did not afford constructive notice of its security interest

in leased equipment, and thus subsequent lienor whose interest was perfected had priority over county; recorded agreement did not mention equipment, recordation in land records was not effectively recordation in Mississippi Uniform Commercial Code records, and lienor had no notice of county's interest. *Peoples Bank & Trust Co. v. Applewhite* (In re 20th Century Enters., Inc.), 152 B.R. 119 (Bankr. N.D. Miss. 1992).

Where financing statement covering steel grain drying bin, which became fixture, was filed in office of county clerk but was not filed in office of registrar of deeds, UCC § 9-401 rendered filing ineffective against bank that subsequently took mortgage on property; under UCC § 9-313, security interest of seller of grain bin, not being properly filed, was not protected, bank's mortgage lien had priority, and purchasers at foreclosure sale acquired all property subject to mortgage, including bin. *Tillotson v. Stephens*, 195 Neb. 104, 237 N.W.2d 108 (1975), overruled on other grounds, *First Nat'l Bank v. Rose*, 213 Neb. 611, 330 N.W.2d 894 (1983).

A chattel mortgage covering fixtures must be filed in office of the town clerk where mortgages on real estate are to be filed, and if the chattel mortgage also included personal property it must be filed in the office of the Secretary of State. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

14. Secretary of State.

In an action by a bank against the endorser of two promissory notes executed by the corporate maker of whom the endorser was secretary and treasurer, the trial court erred in failing to direct a verdict for the endorser where the bank neglected to file its security interest with the office of the secretary of state as required by § 75-9-401(c) even though the collateral agreement included all furniture, appliances and fixtures owned by the maker and where the bank thereby discharged the endorser by impairing the collateral as provided in § 75-3-606(1)(b). *Huey v. Port Gibson Bank*, 390 So. 2d 1005 (Miss. 1980).

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1)(c), and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978) (also holding that since record did not show that second creditor had perfected purchase-money security interest within ten days, as required by UCC § 9-312(4) second creditor was not entitled to preference in debtor's collateral).

Although description of collateral contained in financing statement was standardized provision covering many irrelevant types of collateral, including "all inventory," phrase "all inventory" was sufficient to give other creditors notice that secured party had perfected security interest in not only inventory possessed by debtor at time of execution of security agreement but also inventory acquired thereafter until debt was paid. Thus, although subsequent creditor acquired purchase money security interest in debtor's inventory, subsequent creditor did not have priority of security interest in such inventory under UCC § 9-312 where prior secured party had prior perfected security interest in same inventory, and where subsequent creditor did not perfect its security interest in compliance with UCC § 9-401(1)(c) by filing financing statement in office of secretary of state. *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947 (Tex. Civ. App. 1976).

Financing statement covering “accounts receivable” was properly filed with Office of Secretary of State of state where assignor of account and contract rights kept its records. *Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 501 P.2d 639 (1972).

Enforcement was properly denied to security agreement which was not filed in office of Secretary of State as required by UCC § 9-401(1)(c). *Travelers Indem. Co. v. Clark*, 254 So. 2d 741 (Miss. 1971).

Where financing statement covering security interest in contract rights was only filed with Clay County Register of Deeds and not with Secretary of State as required by UCC § 9-401(1)(c), security interest had no priority against subsequent lien of trustee in bankruptcy. *City of Vermillion v. Stan Houston Equip. Co.*, 341 F. Supp. 707 (D.S.D. 1972).

15. —Dual filing.

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk’s office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor’s financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1)(c), and (2) since second creditor knew about first creditor’s financing statement, first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor’s motel. *First Am. Nat’l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978) (also holding that since record did not show that second creditor had perfected purchase-money security interest within ten days, as required by UCC § 9-312(4) second creditor was not entitled to preference in debtor’s collateral).

Where plaintiff creditor, after entering into financing agreement with debtor, filed financing statement with both secre-

tary of state and clerk of city of Boston in reliance on address listed on debtor’s stationery but did not file such statement with clerk of town of Brookline, which was debtor’s sole place of business in state, as required by Massachusetts version of UCC § 9-401(1)(c), plaintiff was not entitled to be recognized as lien creditor with respect to assignees under subsequent assignment for benefit of debtor’s creditors, even though plaintiff’s filing mistake was understandable. Under Massachusetts version of UCC § 9-401(1)(c), plaintiff’s filing in only one of two required places was not effective, except as to one with actual knowledge, and no contention was made that all creditors represented by assignees had actual knowledge of plaintiff’s financing agreement with debtor. *Uniroyal, Inc. v. Universal Tire & Auto Supply Co.*, 557 F.2d 22 (1st Cir. Mass. 1977).

In junior mortgagee’s action for damages for defendant’s alleged impairment of plaintiff’s security, where defendant under security agreement with dealer in modular homes had security interest in all of dealer’s present or future inventory and also first mortgage on 2.39 acres of land acquired by dealer for use as sales lot, on which dealer installed two modular homes; where plaintiff held second mortgage on dealer’s 2.39 acres as security for loan on which dealer defaulted; and where defendant after dealer’s default quickly removed modular homes from dealer’s lot pursuant to written authorization from officer of dealer’s company, (1) homes placed by dealer on sales lot, although installed on concrete foundations and connected to utilities, were inventory and not real property or fixtures under UCC § 9-109(4), since they were goods intended for immediate or ultimate sale; (2) defendant held perfected purchase-money security interest in dealer’s inventory under UCC § 9-401(1)(c) and UCC § 9-402(1), which under UCC § 9-312(3) took priority over plaintiff’s junior-mortgage interest; and (3) defendant on dealer’s default had right to take possession of homes on dealer’s lot, since they were inventory collateral. *Rakosi v. GECC*, 59 A.D.2d 553 (2d Dep’t 1977).

Where financing statements filed with secretary of state alone and not filed lo-

cally did not protect security interest, lien creditor had priority over holder of security interests. *Package Mach. Co. v. Cosden Oil & Chem. Co.*, 51 A.D.2d 771 (2d Dep't 1976).

Failure of assignee of present and future accounts receivable to file financing statement with secretary of state voided lien as against assignor's creditors, including assignee for benefit of creditors; filing only in city register's office in county in which assignor had its place of business was not enough to properly perfect security interest under UCC § 9-401(1)(c). In re *National N.Y. Packing & Shipping Co.*, 82 Misc. 2d 1010 (1975).

Although bank, which filed financing statement in county clerk's office, failed to perfect its security interest by dual filing with Department of State as required by New York UCC, if subsequent creditor had all knowledge which it would have had if its officer had visited county clerk's office and read financing statement, under New York law it had actual notice of contents of financing statement. In re *Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972).

It was incumbent upon secured party to show that it was entitled to its security by proving that it was filed in accordance with the requirements of UCC § 9-401(1)(c), and where secured party failed to so show, chancellor correctly denied enforcement of the security agreement. *Travelers Indem. Co. v. Clark*, 254 So. 2d 741 (Miss. 1971).

Neither shanty maintained in one county nor trailer maintained in second county and designed to move from job to job constituted "types of business" within Code provision requiring local filing of security interest in local notary's office if debtor has place of business in only one county; held, central filing of security interest in office of secretary of Commonwealth was not sufficient with respect to bankrupt who had only one place of business. In re *Bethlehem Concrete Corp.*, 306 F. Supp. 1047 (E.D. Pa. 1969).

In Pennsylvania there must be a filing in both the office of the prothonotary for the county in which the debtor does business and in the office of the secretary of the Commonwealth. In re *Smith*, 205 F. Supp. 27 (E.D. Pa. 1962).

If central and local filing are both required, a local filing is not sufficient to cure the defect of failing to file in a central office. Filing in such a manner is not a mere irregularity and cannot be overlooked. In re *Dumont-Airplane & Marine Instruments, Inc.*, 203 F. Supp. 511 (S.D.N.Y. 1962).

Where the debtor has its only place of business in one city in the Commonwealth, it is not enough that the financing statement is filed with the Secretary of State, but it must also, under subsection (1)(c) of the instant section, be filed with the city clerk of the city in which the debtor has a place of business. In re *Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

In Pennsylvania, dual filing, locally and centrally, is required by the Code in order to perfect a security interest. In re *Royer's Bakery*, 55 Berks C.L.J. 164 (Pa).

16. —"Place of business".

In a bankruptcy proceeding, a creditor failed to perfect a security interest in equipment sold to a partnership, where it filed a financing statement in a county other than that in which the partnership had its residence and principal place of business as required by § 75-9-401, notwithstanding the fact that the partnership had a mailing address in the county in which the creditor filed the financing statement. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. Tenn. 1982).

Where creditor's secured interest did not become perfected until it gave value to the partnership and the partnership had rights in the collateral, and where neither event occurred until creditor delivered some of the merchandise financed under the security agreement to the partnership, and the first such delivery was made after the partnership had relocated its sole place of business in Jones County, the creditor's failure to file a financing statement in Jones County caused its security interest to be unperfected. *Borg-Warner Acceptance Corp. v. Fedders Fin. Corp.*, 614 F.2d 399 (5th Cir. 1980).

Debtor's "place of business" for purpose of filing financing statement was Roanoke County where debtor purchased equipment for use in laundromat in his shop-

ping center, where shopping center was located primarily in Roanoke County, although small part of it extended into City of Roanoke, where entire physical structure into which equipment was installed was in County and debtor was licensed and taxed by County, and where relationship of debtor's place of business to City was limited to circumstances that sign, phone booth and small portion of parking lot extended into City. *In re Mauck*, 378 F. Supp. 904 (W.D. Va. 1974).

"Principal place of business" where filing is required under UCC § 9-401 is county of factual principal place of business as distinguished from county designated in corporate certificate of incorporation. *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd*, 460 F.2d 1405 (5th Cir. Ga. 1972).

Use of "principal place of business" within UCC § 9-401(1)(b) means factual (court's emphasis) principal place of business, which was county where bankrupt maintained its only business operation rather than county stated in its charter as the site of its principal office. *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd*, 460 F.2d 1405 (5th Cir. Ga. 1972).

Use of phrase "chief place of business" in Maryland Reconstructed Code § 9-401(1) means county in which corporate debtor conducts its greatest volume of business activity, as distinguished from its place of principal office. *Tatelbaum v. Commerce Inv. Co.*, 257 Md. 194, 262 A.2d 494 (1970).

Neither "shanty" nor "trailer" designed to move from job to job would be considered "place of business" within Code filing provision. *In re Bethlehem Concrete Corp.*, 306 F. Supp. 1047 (E.D. Pa. 1969).

The proper place to file copies of installment sale contracts for the purchase of equipment for a butcher business and a retail grocery store was in the office of the Secretary of the Commonwealth, and if all the debtors' places of business were in one county, in the office of the prothonotary of that county, under the Pennsylvania Uniform Commercial Code. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

17. —More than one place of business.

In action between trustee in bankruptcy of contract knitting firm and creditors

seeking to reclaim machinery, filing with secretary of state was sufficient to perfect security interest under UCC § 9-401(1)(c) as to those creditors whose security interests were created while debtor had place of business in more than one county in state; relative secrecy of one place of business was not fatal where its presence was known to those in trade. *In re Mimshell Fabrics, Ltd.*, 491 F.2d 21 (2d Cir. N.Y. 1974).

18. —"Residence" of business.

Under Kentucky version of UCC § 9-401(1)(c), "residence" of resident Kentucky corporation, with regard to determining proper place for filing financing statement in order to perfect security interest in goods sold to such corporation, is location of corporation's "registered office" and not location of its "principal place of business." Moreover, since statute intended distinction between places of filing for resident and nonresident debtors, "residence" and "principal place of business," as used in statute, are not synonymous terms. *NCR v. K.W.C., Inc.*, 432 F. Supp. 82 (E.D. Ky. 1977).

19. —Nonresidents.

Government's perfected tax lien had priority over bank's security interest in funds due taxpayer on construction project where bank failed to perfect its security interest by filing financing statement with secretary of state of taxpayer's home state, as well as with county in which taxpayer had its place of business, as required by UCC § 9-401(1), and where government did not have notice or knowledge of bank's interest in property. *United States v. Ed Lusk Constr. Co.*, 504 F.2d 328 (10th Cir. Okla. 1974).

Where debtor was not a resident of Wyoming and where there was no evidence that secured party had filed a security agreement and financing statement with Secretary of State of Wyoming, Wyoming security agreement and financing statement were not perfected and were not superior to rights of innocent purchasers. *Utah Farm Prod. Credit Ass'n v. Dinner*, 302 F. Supp. 897 (D. Colo. 1969).

20. —Fixtures not subject to subd. (1)(b).

A "trade fixture" was held to be "equipment" and not a "fixture" and thus a filing

with the Secretary of State was required to perfect a security interest therein under UCC § 9-401, and where Secretary of State filing followed bankruptcy petition, even though local filing had preceded petition, trustee in bankruptcy had right to sell trade fixture free of lien of secured party. *In re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971).

Applying the New Jersey rule, the court held that a machine used in the manufacture of corrugated boxes, neither attached to the building in which it was located, nor intended to be so attached, was not a fixture, and the holder of the interest could not prevail in a reclamation proceeding against the purchaser's trustee in bankruptcy when the security interest had not been recorded in the office of the Secretary of State. *In re Park Corrugated Box Corp.*, 249 F. Supp. 56 (D.N.J. 1966).

Under New Jersey law a "trade fixture" is not a fixture within the meaning of subsection (1)(b) so as to relieve the holder of a security interest therein from the requirement that his interest be recorded in the office of the Secretary of State. *In re Park Corrugated Box Corp.*, 249 F. Supp. 56 (D.N.J. 1966).

C. Mistake as to Place of Filing.

21. In general.

Creditor who received as collateral for loan an assignment of and first lien on bankrupt debtor's liquor license, and who filed financing statement respecting such lien and assignment with State Division of Beverage but not with secretary of state as required by Florida version of UCC § 9-401(1)(c), did not have perfected security interest in debtor's liquor license within meaning of UCC § 9-401(2) that was superior to interest in such license of trustee in bankruptcy because (1) UCC § 9-401(2) does not protect creditor who in good faith makes totally improper filing, and (2) trustee had no notice of contents of creditor's improperly filed financing statement. *In re Coed Shop, Inc.*, 435 F. Supp. 472 (N.D. Fla. 1977), *aff'd*, 567 F.2d 1367 (5th Cir. Fla. 1978).

Lien creditor's claim to proceeds of notes, which were pledged to secured party, took precedence over secured party's claim to such proceeds where financ-

ing statement covering such proceeds was filed in wrong place. *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974).

If central and local filing are both required, a local filing is not sufficient to cure the defect of failing to file in a central office. Filing in such a manner is not a mere irregularity and cannot be overlooked. *In re Dumont-Airplane & Marine Instruments, Inc.*, 203 F. Supp. 511 (S.D.N.Y. 1962).

Under § 9-303(1) of the instant chapter, providing that a security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken, a lien is not perfected where one of the applicable steps such as filing with the city clerk as required by subsection (1)(c) of the instant section has not been taken; nor does subsection (2) of the instant section purport to give a creditor a perfected lien, the effect of the latter subsection being only to make the lien effective against persons having actual knowledge of the contents of the financing statement. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

The rights of a seller of equipment for use in a butcher business and a retail grocery store were subordinate to those of the buyers' trustee in bankruptcy where copies of the contracts were not filed in the office of the Secretary of the Commonwealth until after the adjudication in bankruptcy, even though they had previously been filed in the office of the prothonotary of the county wherein the buyers conducted their business, because the notice effected by the filing in the prothonotary's office was not equivalent to knowledge of the filing under this section. *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

22. Good faith.

Under UCC § 9-401(2), bank's improperly filed financing statement covering debtor's inventory rendered bank's security interest in inventory inferior to properly perfected security interest in such inventory of franchisor of debtor's business, despite bank's good faith in making its improper filing, where franchisor at time of perfecting its security interest in debtor's inventory did not have actual knowledge, or any reason to have actual

knowledge, of either contents of bank's financing statement or fact that bank had filed such statement. *First State Bank v. United Dollar Stores*, 571 P.2d 444 (Okla. 1977).

Harvesting combines were "equipment used in farming operations", even though purchaser was not farmer but "custom harvester"; therefore trustee in bankruptcy was entitled to prevail of combine seller who had failed to record security interest in office of county recorder, despite fact that good faith filing had been made by seller in office of Secretary of State, in absence of proof that trustee in bankruptcy or perhaps all of unsecured creditors had actual knowledge of contents of financing statement. *Sequoia Mach., Inc. v. Jarrett*, 410 F.2d 1116 (9th Cir. Cal. 1969).

The phrase "in good faith" appearing in subsection (2) is descriptive and not mandatory, and affirmative proof is not required of the holder of a security interest. *In re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

23. Actual knowledge of financing statement.

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401(1)(c), and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401(2), had properly secured its interest in after-acquired personal property in debtor's motel. *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978) (also holding that since record did not show that second creditor had perfected purchase-money security

interest within ten days, as required by UCC § 9-312(4) second creditor was not entitled to preference in debtor's collateral).

Where (1) automobile dealer obtained Small Business Administration loan from plaintiff bank and executed security agreement in bank's favor covering dealer's shop equipment, furniture, fixtures, accounts receivable, and inventory, except new cars, (2) bank filed financing statement on November 26, 1974 in county chancery clerk's office but not with office of secretary of state, (3) dealer on February 20, 1975 granted security interest in same collateral to defendant credit corporation to cover dealer's indebtedness for new cars, and such security interest was properly perfected, (4) at time defendant's branch manager removed collateral from dealer's premises, dealer informed him that collateral was subject to bank's security interest, and (5) branch manager did not check records in county chancery clerk's office to determine whether bank's financing statement covering such collateral had been filed, court held that information given by dealer to defendant's branch manager constituted knowledge of contents of bank's financing statement within meaning of UCC § 9-401(2), so as to perfect bank's security interest in collateral and render it superior to that of defendant. *Chrysler Credit Corp. v. Bank of Wiggins*, 358 So. 2d 714 (Miss. 1978) (also holding that since defendant failed to prove in accordance with UCC § 9-306(2) that four of dealer's used cars had been purchased with proceeds of new-car sales, such used cars were part of inventory covered by bank's security interest).

"Knowledge" as used in UCC § 9-401(2) means "actual knowledge" or "reason to have actual knowledge," and not constructive knowledge in any broader sense. *First State Bank v. United Dollar Stores*, 571 P.2d 444 (Okla. 1977).

Subsequent creditor had actual knowledge under UCC §§ 9-401(2) and 1-201(25) of contents of improperly filed financing statement, and thus financing was effective against subsequent creditor, where subsequent creditor was aware at time that debtor came to it for loan that, except for about \$13,000, all of debtor's

\$160,000 net worth was pledged for two prior bank loans and that pledge covered debtor's equipment. *Enark Indus., Inc. v. Bush*, 86 Misc. 2d 985 (1976).

Where it appeared that party claiming security interest had all the knowledge which it would have had if it had visited the clerk's office and read the financing statement, it had actual notice under New York law despite fact that there was a defect in the filing of the statement. *In re Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972).

If all creditors represented by debtor's assignee for the benefit of creditors had knowledge of the contents of an inadequately filed financing statement at the time the assignment was made, reclaimant holding the security interest would have a claim superior to that of the assignee and the debtor's trustee in bankruptcy, but actual knowledge on the part of the creditors is a question of fact on which reclaimant would have the burden of proof before the referee. *In re Komfo Prods. Corp.*, 247 F. Supp. 229 (E.D. Pa. 1965).

Subsection (2) of the instant section makes a lien effective as to persons having actual knowledge of the financing statement, despite a failure to make a proper filing of the statement, but it does not make the improper filing effective as to any one not having such knowledge, nor does it make the lien a perfected lien. *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

24. —Knowledge of security agreement distinguished.

Security interest of creditor which was properly filed and perfected prior to time security interest of second creditor in same collateral (appliances) was either properly filed or perfected had priority under UCC § 9-312(5)(a), and such priority was not affected by first creditor's alleged knowledge of contents of second creditor's security agreement with debtor based on receipt of partial copy of such agreement, since under UCC § 9-401(2) knowledge of contents of a creditor's improperly filed financing statement-and not knowledge of such creditor's security agreement with his debtor-is what is necessary to render effective a good-faith

but improperly filed financing statement. *In re County Green Ltd. Partnership*, 438 F. Supp. 693 (W.D. Va. 1977).

UCC § 9-401(2) requires knowledge of contents of the improperly filed financing statement-not knowledge of contents of creditor's security agreement with debtor. Furthermore, under UCC § 1-201(25)(a), such knowledge must be actual knowledge. *In re County Green Ltd. Partnership*, 438 F. Supp. 693 (W.D. Va. 1977).

Secured creditor's lien was not entitled to priority over federal tax lien where financing statement was filed with county recorder instead of secretary of state as required by UCC § 9-401; although government had actual knowledge of security interest sufficient to give plaintiff priority under UCC § 9-301, federal test to determine existence of security interest was not met. *Fred Kraus & Sons v. United States*, 369 F. Supp. 1089 (N.D. Ind. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. Ind. 1974).

Where there is a close relationship between a corporate debtor and the partnership to which the business is thereafter transferred, and both enterprises have a common dominant officer, knowledge of the security interest will be imputed to the successor enterprise so that the security interest is valid both as against the debtor and as against the successor enterprise, even though there has not been a proper filing because the filing was made in the office of the land records of the county. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. Ark. 1969).

25. —Trustee in bankruptcy or the like.

In action to determine right to proceeds derived from sheriff's sale between secured party and State to whom delinquent sales taxes were owed, financing statement improperly filed with recorder of deeds was effective against State where sales tax representative of Department of Revenue had checked recorder of deeds' records and knew of financing statement and secured party's lien was therefore superior to State's subsequently filed sales tax lien. *State v. Kerr*, 509 S.W.2d 61 (Mo. 1974).

An assignee for benefit of creditors stands in the position of a lien creditor by

operation of law at the time of the assignment and is not charged with knowledge of the existence of an alleged prior security interest which has not been perfected because it was filed in a wrong office. In re Worldwide Handbag Co., 4 U.C.C. Rep. Serv. 608 (1967, NY Sup).

26. Collateral as to which filing proper.

If security interest covers several types of collateral requiring different filing procedures, security interest would be perfected with respect to collateral against which filing is proper, but unperfected as against collateral which required another place of filing. Failure to file with Secretary of State and recording of chattel mortgage in county was not sufficient to perfect security interest in chattel mortgage. In re Dean Monagin, Inc., 18 Mich. App. 171, 170 N.W.2d 924 (1969).

D. Change in Circumstances Controlling Filing.

27. In general.

Proper place of filing was controlled by circumstances existing at time of last act necessary for perfection; thus, where appliance manufacturer filed in one county prior to debtor business moving to another county, and manufacturer subsequently delivered goods to debtor in second county, filing in first county was ineffective to perfect manufacturer's security interest in goods. Borg-Warner Acceptance Corp. v. Fedders Fin. Corp., 614 F.2d 399 (5th Cir. 1980).

Where creditor's secured interest did not become perfected until it gave value to the partnership and the partnership had rights in the collateral, and where neither event occurred until creditor delivered some of the merchandise financed under the security agreement to the partnership, and the first such delivery was made after the partnership had relocated its sole place of business in Jones County, the creditor's failure to file a financing statement in Jones County caused its security interest to be unperfected. Borg-Warner Acceptance Corp. v. Fedders Fin. Corp., 614 F.2d 399 (5th Cir. 1980).

While both the time of filing rule and the time of attachment rule have merit,

neither rule furthers the important policy of providing notice to subsequent creditors of the prior existing security interest as well as a rule based upon the last event; by requiring that the determination of the proper place to file be made at the time when the last event occurs upon which the perfection of the creditor's security interest is based, the last event rule insures that the place in which the filing is made and the contents of the filing will reflect any changes made by the debtor between the time of attachment and the time of filing, regardless of which came first. The filer would be more likely to reflect the location and status of the debtor which exists at the time a subsequent creditor is searching the records to determine what prior security interests have been perfected against the debtor and therefore will be more likely to be found by such a subsequent creditor. Accordingly, the secured party must determine the correct place in which to file his financing statement on the basis of the facts existing at the time when the last event necessary for the perfection of his security interests occurs. Borg-Warner Acceptance Corp. v. Fedders Fin. Corp., 614 F.2d 399 (5th Cir. 1980).

Where financing statement was properly filed in 1970 under Maryland version of UCC § 9-401(1) with clerk of circuit court in order to perfect lender's security interest in truck dealer's new and used trucks to be purchased for inventory, and where such statute was amended by Maryland legislature in 1971 to require filing of certain financing statements with Department of Assessments and Taxation, but amendment expressly preserved effectiveness of financing statements filed prior to amendment, fact that lender in 1973 filed ineffective financing statement with clerk of circuit court instead of Department of Assessments and Taxation did not adversely affect prior perfection of lender's security interest. Frankel v. Associates Fin. Servs. Co., 281 Md. 172, 377 A.2d 1166 (1977).

Where debtor was corporation that operated retail clothing store, where secured party acquired perfected purchase money security interest in debtor's inventory including its proceeds and after-acquired

property, where debtor corporation merged with other corporations, each operating retail clothing outlets, and, finally, where surviving corporation entered into assignment for benefit of creditors: (1) secured party had valid security interest in after-acquired inventory of debtor, notwithstanding that at time of assignment for benefit of creditors surviving corporation did not have in its possession any inventory purchased from secured party by surviving corporation for any of its constituent corporations; (2) after-acquired property clause extended to property acquired by surviving corporation after merger; and (3) financing statement on file at time of assignment for benefit of creditors was not deficient though it did not contain name of debtor-assignor. However, secured party did not have security interest in the proceeds of inventory from other stores not covered by security agreement. *Inter Mt. Ass'n of Credit Men v. Villager, Inc.*, 527 P.2d 664 (Utah 1974).

Where debtor moved inventory subject to security interest from one store to another, security interest's perfected status remained intact without necessity of refile. *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327 (N.D. Fla. 1972), *aff'd*, 486 F.2d 1401 (5th Cir. Fla. 1973).

28. Motor vehicles.

Where (1) debtors, at time security interest attached to mobile home purchased from creditor, were actually living in Fulton County, New York, (2) debtors, before August 6, 1973, moved to Herkimer County, New York, where home had been delivered and installed on its site, (3) on August 6, 1973, bank which was secured creditor's assignee filed financing statement in Fulton County, (4) debtors filed petition in bankruptcy, and (5) bank reassigned its interest in security agreement to plaintiff which repossessed home, plaintiff had secured-creditor status as against debtor's general creditors because (1) under UCC § 9-401(1)(a), proper place for filing financing statement covering consumer goods was county of debtor's actual residence at time security interest attached, and (2) after plaintiff's security interest had been perfected by filing in

proper place, under UCC § 9-401(3), it remained effective, regardless of number of times or places debtors or collateral might thereafter move. *In re Knapp* (C.A.2 (N.Y.) 1978) 575 F.2d 341, 23 UCCRS 1354 (applying New York law; rejecting contention of bankruptcy trustee that county of debtors' residence at time financing statement was filed should control plaintiff's status as secured creditor).

A chattel mortgage of an automobile filed where the car was located and the mortgagor resided is valid as against mortgagor's trustee in bankruptcy even though instrument was not recorded in the locality to which mortgagor removed taking the chattel, both under existing statutes and the Commercial Code. *In re Mohammed*, 327 F.2d 616 (6th Cir. Mich. 1964).

A local statute may require that a buyer of a car titled in another state make inquiries of a designated official in such originating state and if the buyer fails to comply with such statute he cannot claim the status of an innocent purchaser so as to destroy a foreign security interest in the collateral but instead he takes the title subject to such outstanding security interest. *Gelfo v. GMAC*, 206 So. 2d 247 (Fla. App. 1968), but see *Northside Motors v. GMAC*, 255 So. 2d 560 (Fla. Ct. App. 1971).

The holder of a security interest, perfected by the proper filing of a chattel mortgage in the county in which an automobile was purchased and certificate of title was issued, and which remained a perfected interest under the provisions of subdivision 3 of this section as enacted in Wyoming for four months after the security was removed held a lien on the security superior to that of a judgment creditor who levied upon the automobile in the second county without knowledge or notice of the chattel mortgage, but did so before expiration of the four-month period following removal. *Slates v. Commercial Credit Corp.*, 412 P.2d 444 (Wyo. 1966).

E. Decisions Under Former Statutes.

29. Decisions under Code 1942 § 863.

Where a mobile homes dealer entered into a conditional sales transaction

wherein he sold a mobile home to himself, executing a dealer's assignment of the contract to a financing company, and subsequently sold the same mobile home to an individual buyer, representing to the buyer that the mobile home was free of all liens and encumbrances, the buyer was an innocent purchaser for value and his purchase was not subject to the prior recorded conditional sales contract. *G.A.C. Trans-World Acceptance Corp. v. Migrothy*, 230 So. 2d 577 (Miss. 1970).

Mortgagee not required to record mortgage in county to which mortgaged property removed without consent. *Cole-McIntyre-Norfleet Co. v. Du Bard*, 135 Miss. 20, 99 So. 474 (1924).

Deed of trust on personal property immediately taken to county of buyer's residence not constructive notice to subsequent purchaser for value unless recorded in such county. *McLarty v. Ashmore*, 128 Miss. 735, 91 So. 421 (1922).

Purchaser of property covered by deed of trust which referred to notes secured thereby, chargeable with notice that notes provided for attorney's fees. *Turberville v. Simpson*, 94 Miss. 154, 47 So. 784 (1908).

This section [Code 1942, § 863] does not apply in favor of a purchaser who acquired title in a county where the instrument was recorded, although the property was delivered to him in another county, where it remained for more than twelve months before the instrument was there recorded. *Ladd v. Alcorn*, 71 Miss. 395, 14 So. 266 (1893).

Permission before the expiration of twelve months does not defeat the lien. *Elson v. Barrier*, 56 Miss. 394 (1879).

The statute does not apply unless the removal of the property be by the consent, permission or participation of the person claiming title. *Bogard v. Gardley*, 12 Miss. (4 S. & M.) 302 (1845).

This statute applies to marriage contracts. *Moss v. Davidson*, 9 Miss. (1 S. & M.) 112 (1843); *Pickett v. Banks*, 19 Miss. (11 S. & M.) 445 (1848).

30. Decisions under Code 1942 § 870.

In a bankruptcy proceeding, a creditor failed to perfect a security interest in equipment sold to a partnership, where it

filed a financing statement in a county other than that in which the partnership had its residence and principal place of business as required by § 75-9-401, notwithstanding the fact that the partnership had a mailing address in the county in which the creditor filed the financing statement. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. Tenn. 1982).

Where at the time of their purchase in Tennessee the laws of that state did not require the recordation of conditional sales contracts, the lien of the conditional vendor was superior to that of an attaching creditor in Mississippi when the vehicles were only transitorily in the latter state. *Clark Equip. Co. v. Poultry Packers, Inc.*, 254 Miss. 589, 181 So. 2d 908 (1966).

Where Tennessee would construe a conditional sales contract for the sale of a motor vehicle executed in that state as being essentially a lien which must be recorded, the conditional sales contract upon a motor vehicle removed to Mississippi must come within the grouping of "other liens on personal property executed out of this state" as that phrase is used in this section [Code 1942, § 870]. *Memphis Bank & Trust Co. v. Blount*, 252 Miss. 289, 172 So. 2d 778 (1965).

The rights of the mortgagee of an automobile involved in a collision to the insurance thereon, under a mortgage clause in the policy, are superior to an attachment in an action for damages caused by the collision, though not filed in the state in which the automobile was attached. *Associates Disct. Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535 (1961).

Where an automobile was sold in Tennessee under a conditional sales contract which was assigned to a finance company and where later the buyer sold the car to a Mississippi corporation which in turn sold the car to an innocent purchaser for value, the finance company was entitled to recover the automobile in an action of replevin after there had been a default in the payment under the conditional sales contract, even though the contract was not recorded, since a conditional sales contract is not required to be recorded

under the law of Tennessee. *Mid-Continent Fin. Corp. v. Grant*, 213 Miss. 789, 58 So. 2d 1 (1952).

In replevin by trustee of deed of trust executed in Louisiana on two demilitarized army tanks against purchaser buying tanks before recording of deed of trust in Mississippi, evidence warranted directed verdict in favor of purchaser as bona fide purchaser without notice of prior unrecorded foreign deed of trust covering tanks. *Oubre v. Skrmetti*, 204 Miss. 542, 37 So. 2d 763 (1948).

Question whether Alabama conditional sales contract constitutes lien on automobile sold and delivered in Alabama as security for unpaid purchase price so as to come within the recording requirement of this section [Code 1942, § 870] is governed by the laws of Alabama. *Patterson v. Universal C.I.T. Credit Corp.*, 204 Miss. 268, 37 So. 2d 306 (1948).

Conditional sales contract covering sale of automobile in Alabama for use in Mississippi, under which seller retained title until unpaid balance of purchase price was paid, being a lien on automobile under Alabama law, must be recorded in Mississippi in order to protect rights of holder of conditional sales contract, against an innocent purchaser for value in

this state. *Patterson v. Universal C.I.T. Credit Corp.*, 204 Miss. 268, 37 So. 2d 306 (1948).

Re-recording under this section [Code 1942, § 870] of purchase money mortgages on motor vehicles, recorded outside of the state, is not required as to motor vehicles temporarily or transitorily in state on business errand. *Russum v. Gans*, 190 Miss. 584, 1 So. 2d 235 (1941).

Where a motor truck mortgage is recorded in one state, occasional trips across the state line to a neighboring town in another state, on business errands, does not constitute removal to such other state requiring recording of the mortgage there within the purview of this section [Code 1942, § 870]. *Russum v. Gans*, 190 Miss. 584, 1 So. 2d 235 (1941).

Agreed statement of facts, construed to mean car had been "removed into this state" within statute as to priority between foreign chattel mortgages and local attachments. *Vines v. Sparks*, 148 Miss. 219, 114 So. 322 (1927).

Creditor without notice, attaching in state car removed there after mortgage in other state, recorded there only, held to have superior rights. *Vines v. Sparks*, 148 Miss. 219, 114 So. 322 (1927).

RESEARCH REFERENCES

ALR. Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states. 10 A.L.R.2d 764.

Necessity of recording or filing chattel mortgage in state to which property is removed. 13 A.L.R.2d 1318.

Attorney's liability for negligence in preparing or recording security document. 87 A.L.R.2d 991.

Am Jur. 35 Am. Jur. 2d, Fixtures §§ 50, 51.

66 Am. Jur. 2d, Records and Recording Laws §§ 57-59.

68A Am. Jur. 2d, Secured Transactions §§ 378-380.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:414 (collateral as

fixture; priority of real estate mortgage over security interest not filed in real estate mortgage records).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:611, 9:613-9:620 (place; erroneous filing).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:153-9:155 (instructions to jury; proper filing as perfecting security interest between parties).

3A Am. Jur. Legal Forms 2d, Bailments and Personal Property § 36:132 (filing and recording of lease agreement).

CJS. 76 C.J.S., Records § 7.

Law Reviews. 1984 Mississippi Supreme Court Review: Property.

The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 75-9-502. Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

(a) Subject to subsection (b), a financing statement is sufficient only if it:

- (1) Provides the name of the debtor;
- (2) Provides the name of the secured party or a representative of the secured party; and
- (3) Indicates the collateral covered by the financing statement.

(b) Except as otherwise provided in Section 75-9-501(b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) and also:

- (1) Indicate that it covers this type of collateral;
- (2) Indicate that it is to be filed for record in the real property records;
- (3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
- (4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

- (1) The record indicates the goods or accounts that it covers;
- (2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
- (3) The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and
- (4) The record is duly recorded.

(d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

SOURCES: Former 1972 Code § 75-9-502 [Codes, 1942, § 41A:9-502; Laws, 1966, ch. 316, § 9-502; Laws, 1977, ch. 452, § 33, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-607 and 75-9-608 by Laws, 2001, ch. 495, § 1. Present § 75-9-502 was derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Applicability of requirements of this section to “fixture filings”, see § 75-9-313.

Continuance of effectiveness of filing notwithstanding change of debtor’s residence or location of collateral, see § 75-9-401(3).

Filing of financing statement, see § 75-9-403.

Assignment of security interest, see § 75-9-405.

JUDICIAL DECISIONS

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41. Transfer of collateral by debtor.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(1), (5), (6).

6. In general; scope.

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debt-

or's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

The Code adopts the system of notice filing under which it is contemplated that the complete state of affairs will be learned only after inquiry. *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535, 4 U.C.C. Rep. Serv. 56 (L. Div. 1967); *In re Platt*, 257 F. Supp. 478, 3 U.C.C. Rep. Serv. 719 (E.D. Pa. 1966).

Liability between the parties is created by the execution of a security agreement or other instrument, but no personal liability is created by the execution of a financing statement. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

Sections 65 and 70 of the New York Personal Property Law which provide the effect and method of filing conditional sales contracts have now been superseded by §§ 9-402 and 9-403(1) of the UCC. In re

Mutual Bd. & Packaging Corp., 342 F.2d 294 (2d Cir. N.Y. 1965).

The provision of subsection (1) of the instant section that "a financing statement is sufficient if it is signed by the debtor and the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral" adopts the system of notice filing under which what is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

The Code adopts the notice system of filing which places the burden of further inquiry upon anyone seeking additional information. *Hartford Accident & Indem. Co. v. State Pub. Sch. Bldg. Auth.*, 26 Pa. D. & C.2d 717 (1961).

7. Purpose.

Although financing statement under UCC § 9-402(1) may be filed before security agreement is made or security interest otherwise attaches, financing statement standing alone does not create security interest in debtor's property, but merely serves notice that named creditor may have a security interest therein. Thus, where buyer of tractor did not execute security agreement granting security interest in tractor to seller, and where seller did not take possession of tractor when financing statement signed by buyer was executed, seller under UCC § 9-203(1)(a) and (b) had no valid security interest in tractor, even though financing statement was filed for record in office of county circuit clerk. *Gibbs v. King*, 263 Ark. 338, 564 S.W.2d 515 (1978).

Uniform Commercial Code § 9-402 adopts a system of "notice filing" which merely indicates that the secured party may have a security interest in the collateral described, the purpose of the filed statement being to give sufficient information necessary to put a searcher on inquiry, and the secured party has the duty to make sure of proper filing and indexing. *John Deere Co. v. William C. Pahl Constr.*

Co., 59 Misc. 2d 872 (1969), *aff'd*, 34 A.D.2d 85, 310 N.Y.S.2d 945 (4 Dep't 1970).

The purpose of the statute is to avoid the real estate type of closing where all parties go to the clerk's office, check the records, execute the financing statement and file it secure in the knowledge that the creditor has first priority. The statute was designed to allow a creditor to preempt first rights against the borrower. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

The purpose of filing is to put the public generally on notice of the prior interest in collateral so that inquiry can be made. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

Under the Code the financing statement merely gives notice that an identified person, the creditor, may have a security interest in certain property, the collateral, but does not require a filing of the security agreement. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

The purpose of the adoption of the notice filing system, under the first sentence of subsection (1) of the instant section, was to provide a method of protecting security interests which at the same time would give potential creditors and other interested persons information and procedures adequate to enable the ascertainment of the facts they need to know. Inasmuch as the adoption of this system reflects a decision of policy by the experts who framed the Uniform Commercial Code, the court will so interpret the statute as to carry out the intent of the framers of the Code. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

The purpose of the notice filing under this section is to give notice that the secured party who has filed may have a security interest in the collateral described, and that further inquiry will be necessary to disclose the complete state of affairs. *Annawan Mills, Inc. v. Northeastern Fibers Co.*, 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

8. Sufficiency of financing statement, generally.

Description of collateral in financing statement as consumer goods, personal property of all kinds and types, located on

or about debtor's residence, not including household goods as defined in FTC rule, was sufficiently definite to permit perfection of security interest. *In re Boykins*, 120 B.R. 71 (Bankr. N.D. Miss. 1990).

Significance of error in financing statement, for purpose of determining whether it is seriously misleading, must be determined in light of what is "commercially reasonable." *Pongetti v. Deposit Guar. Nat'l Bank (In re Strickland)*, 94 B.R. 898 (Bankr. N.D. Miss. 1988).

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Under UCC § 9-402(1), a financing statement must include the name and

address of the debtor. In this connection, however, the term “debtor” is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep’t 1978).

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code’s notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Where chattel mortgage on trailer was defective under UCC § 9-402(1) as filed financing statement because it lacked both address of secured party and debtor’s mailing address, chattel mortgagee’s security interest was unperfected under § 9-302(1), and under UCC § 9-301(1)(b), judgment lien creditor, which had obtained judgment against chattel mortgagor, executed on such judgment, and seized trailer in suit, had priority to proceeds from trailer’s sale. *Cushman Sales & Serv. of Neb., Inc. v. Muirhead*, 201 Neb. 495, 268 N.W.2d 440 (1978).

Identification of debtor, “Southern Supply Company of Greenville, N.C., Inc.,” in financing statements as “Southern Supply Co.” was not “seriously misleading” within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *Matter of Southern Supply Co. of Greenville, North Carolina, Inc.*, 1975, 405 F. Supp. 20.

Where defendant bank made loan to debtor under name “Lee Anderson,” took

security agreement on new automobile which was properly filed in county clerk’s office and indexed under name of “Lee Anderson,” but did not examine manufacturer’s statement of origin, issued earlier to James Anderson, and took no steps to assure itself that car’s title papers would be issued in name of Lee Anderson, where debtor applied for and received certificate of title in name of “James L. Anderson,” and where plaintiff bank also made loan to debtor, as “James L. Anderson,” taking and filing security agreement covering same automobile after checking with county clerk’s office and determining that no prior liens on automobile had been filed against James L. Anderson, defendant bank’s failure to file its lien in name shown on certificate of title was responsible for plaintiff bank’s later determination, justified by lien records of county clerk, that there was no prior lien on record against automobile owned by James L. Anderson, and thus plaintiff bank’s lien was entitled to priority over defendant bank’s lien, although defendant bank was guilty of no intentional wrong and did all that was required by applicable provisions of UCC in taking and filing its security agreement. *Central Nat’l Bank & Trust Co. v. Community Bank & Trust Co.*, 528 P.2d 710 (1974).

Under California version of UCC § 9-402(1), requirement that trade name as well as true name of debtor be included in financing statement was mandatory for perfection of security interest, despite fact that in particular case no creditor was actually misled by absence of trade name. *In re Thrift Shoe Co.*, 502 F.2d 1211 (9th Cir. Cal. 1974).

Filing in 1967 of financing statement covering debtors’ crops was sufficient under Indiana law to perfect security interest in crops arising out of security agreement executed in 1968. *United States v. Gleaners & Farmers Coop. Elevator Co.*, 481 F.2d 104 (7th Cir. Ind. 1973).

Financing statements which did not contain correct name of debtor but listed debtor only by tradename used by debtor for his business did not substantially comply with statutory requirement and were fatally defective. *In re Thomas*, 466 F.2d 51 (9th Cir. Cal. 1972).

Under the UCC system of "notice" filing, the recorded statements indicated merely that the secured party of record may have a security interest in the collateral described, and further inquiry is necessary, as is stated in Comment 2 to UCC § 9-402, to disclose the complete state of affairs, or, otherwise stated, a financing statement discloses sufficient information if it enables any concerned creditor to contact the secured party or the claimant. *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971).

Failure of Connecticut certificate of title to auto to state date of security agreement did not invalidate security interest in auto, absent any indication that omission misled trustee in bankruptcy or any creditor of bankrupt-owner of auto. *In re Grandmont*, 310 F. Supp. 968 (D. Conn. 1970).

The necessity of stating the maturity date of the obligation secured is not among the enumerated steps required to make sufficient the financing statement; however, the insertion of "demand" would not seriously mislead a later party in his attempt to locate the underlying security agreement. *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 455 F.2d 141 (4th Cir. Md. 1970).

In view of broad purposes of UCC, restrictive construction should not be given to provision which sets forth what constitutes "sufficient" financing statement. *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

Signed and filed financing statement afforded creditor no security interest in corn sold by debtor, where financing statement contained no language which could be interpreted as granting a security interest. *Kaiser Aluminum & Chem. Sales, Inc. v. Hurst*, 176 N.W.2d 166 (Iowa 1970).

Where a creditor's assistant treasurer intended to sign a financing statement but through inadvertence filed the statement without signing it, the typed words of the creditor's name were not an intended use of a symbol as a signature and the financing statement was not "signed" within the Code § 1-201(39) definition nor within the Code § 9-402(1) requirement even though a search of the town clerk's records would

have disclosed the unsigned financing statement and the name and address of the secured party as typed in the blank space, the "unsigned" statement did not "substantially comply" with the Code requirements under § 9-402(5). *Maine League Fed. Credit Union v. Atlantic Motors*, 250 A.2d 497 (Me. 1969).

Sufficiency of financing statement will not be decided on motion for judgment on pleadings. *West Publishing Co. v. Harrisburg Nat'l Bank & Trust Co.*, 48 Pa. D. & C.2d 53 (1969).

9. Misspelling of debtor's name.

Misspelling of corporate debtor's name—"Ranelli" instead of "Ranalli"—on filed financing statement was seriously misleading and amounted to no filing at all, so that security interest was ineffective as to person in possession. *John Deere Co. v. William C. Pahl Constr. Co.*, 59 Misc. 2d 872 (1969), *aff'd*, 34 A.D.2d 85, 310 N.Y.S.2d 945 (4 Dep't 1970).

A financing statement is insufficient when it spells the name of the debtor as Kaplan when in fact it is Kaplas. *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

Under the provisions of subsection (5) of the instant section, a financing statement which substantially complies with the requirements of the section is sufficient even though it contains minor errors which are not seriously misleading. Thus, where the debtor was described as "Carroll, Edmund d/b/a Cozy Kitchen 574 Wash St Canton, Mass" and the word "Cozy" should have been "Kozy", it was held that the name of the debtor was accurately stated and the error in the name under which he did business was a minor error which was not seriously misleading. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

10. Misstatement of debtor's corporate or trade name.

Financing statement which fails to list the debtor's corporate name, and which gives only debtor's trade name, may nevertheless be sufficient if trade name is sufficiently similar to corporate name that it is not seriously misleading. *Sencore, Inc. v. Pongetti (In re Columbus Type-*

writer Co.), 75 B.R. 834 (Bankr. N.D. Miss. 1987).

Identification of debtor, "Southern Supply Company of Greenville, N.C., Inc.," in financing statements as "Southern Supply Co." was not "seriously misleading" within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *In re Southern Supply Co.*, 405 F. Supp. 20 (E.D.N.C. 1975).

Financing statement describing debtor as "Nara Dist. Inc." when in fact correct name of debtor was "Nara Non Food Distributing Inc." was sufficient as putting any interested person fairly on notice that there might be an outstanding lien against the Nara intended. *In re Nara Non Food Distrib. Inc.*, 66 Misc. 2d 779 (1970), *aff'd*, 36 A.D.2d 796, 320 N.Y.S.2d 1014 (2d Dep't 1971).

Erroneous financing statement identification of secured party as "O. M. Scott Sons Co.", where even most basic inquiry to former would disclose that it was wholly owned subsidiary of latter, and would lead to full disclosure of exact state of affairs regarding asserted security interest. *In re Colorado Mercantile Co.*, 299 F. Supp. 55 (D. Colo. 1969).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. *In re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. Conn. 1965).

11. Use of debtor's trade name only.

Secured party's financing statements were sufficient under UCC § 9-402 to perfect security interest in debtor's equipment, notwithstanding filing officer filed and indexed financing statements only under trade name of debtor, Kaw Lake Cement, and not under his true name, Joseph Arthur Fowler, where each financing statement named three debtors, Kaw Lake Cement, Jerry A. Fowler and J. A. Fowler. *McMillin v. First Nat'l Bank & Trust Co.*, 407 F. Supp. 799 (W.D. Okla. 1975).

Financing statement which did not contain name of bankrupt debtor, but instead contained name of business that debtor

was engaged in, was not in substantial compliance with Code. *In re Thomas*, 310 F. Supp. 338 (N.D. Cal. 1970), *aff'd*, 466 F.2d 51 (9th Cir. Cal. 1972).

12. Misidentification of secured party.

Although the Uniform Commercial Code clearly contemplates and sanctions "floating collateral" (after-acquired property of debtor) and "floating debt" (future advances), it does not contemplate "floating secured parties"—that is, an open-ended class of creditors with unsecured and unperfected interests who, after the debtor's bankruptcy, can assign their claims to a more senior lienor and magically secure and perfect their interests under an omnibus security agreement and financing statement. To allow "floating secured parties" would clearly be at odds with the "simple notice" requirements of UCC § 9-402 and would undercut perfection requirement of Article 9, which reflects UCC policy against secret security. *Republic Nat'l Bank v. Fitzgerald*, 565 F.2d 366 (5th Cir. Tex. 1978).

Financing statement which identified the debtor, an individual named Henry Platt, as Platt Fur Co., an unregistered fictitious name for debtor's business, was not "seriously misleading" and did not prejudice the perfection of the creditor's claim. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

13. Failure to identify owner of collateral.

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to

plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Use of nominee was legitimate under Uniform Commercial Code; thus, recording of financing statement was entirely proper despite fact that principal creditor's nominee, rather than principal creditor, was named as secured party. In re *Cushman Bakery*, 526 F.2d 23 (1st Cir. Me. 1975), cert. denied, 425 U.S. 937, 96 S. Ct. 1670, 48 L. Ed. 2d 178 (1976).

Under UCC § 9-402(1), a financing statement must include the name and address of the debtor. In this connection, however, the term "debtor" is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Although owner of property permitted debtor to use it as collateral for loan from secured party and valid security interest attached in favor of secured party under security agreement given by debtor, secured party failed to properly perfect its interest in that financing statement it filed did not contain any reference to owner of collateral; in view of provision of UCC § 9-105(1)(d), that term "debtor" may include both owner of collateral and obligor if context so requires, UCC § 9-402, subdivisions (1) and (3), requiring

that financing statement contain "debtor's" name, must be construed as referring to both actual debtor and owner of collateral, thus requiring both names on financing statement to perfect security interest. *K.N.C. Whsle., Inc. v. AWMCO, Inc.*, 56 Cal. App. 3d 315, 99 A.L.R.3d 473 (1st Dist. 1976).

14. Effect of debtor's change of name or corporate structure.

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant,

(5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Secured party apparently has duty under second sentence of UCC § 9-402(7) to monitor identity of debtor. Thus, secured party must take steps to insure that it will become aware of any changes of name, identity, or corporate structure of its debtor within four months after such change or else risk losing its perfected security interest in collateral acquired after that time, should the financing statement be found to be seriously misleading at time of the change. In *re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Where (1) debtors, after secured party had perfected security interest in debtors' business fixtures, equipment, merchandise, inventory, and after-acquired property, transferred such collateral to corporation formed by debtors to operate business under new name, (2) corporation two and a half years later became bankrupt, (3) at time of such bankruptcy, merchandise and inventory of the business was not the same as that owned by original debtors when security interest was acquired by secured party, and (4) bankruptcy trustee claimed that under UCC § 9-402(7), secured party had only unsecured claim to proceeds from sale of corporation's inventory and merchandise acquired after four-month period following transfer of original inventory and merchandise to corporation, since such transfer involved change in the business' ownership and name that was seriously misleading, court held (1) that secured party did not have to file new financing statement within four months following

such transfer in order to retain its perfected security interest in the after-acquired property, (2) that transfer situation was governed by third sentence of UCC § 9-402(7), and (3) that if any creditors had checked the corporation's source of title, they could easily have discovered the corporation's assumption of notes which were in the original debtors' individual names and, by running a check on those names, have found the secured party's filed financing statement. In *re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Under UCC § 9-402, creditor, as holder of prior secured interest against debtor, did not have affirmative duty to amend or refile financing statement to reflect name change of debtor from "South Haven Fruit Exchange" to "Blossom Trail Growers, Inc." in order to preserve its superior interest over subsequent creditor which had perfected its security interest against "Blossom Trail Growers, Inc." *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where financing statement was properly filed and debtor subsequently changed its corporate name, secured party was not under obligation to refile its financing statement to reflect such change of name notwithstanding secured party had knowledge of the change. *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 57 Mich. App. 1, 225 N.W.2d 209 (1974), *aff'd*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where secured party had perfected purchase money security interest in television equipment which it sold to debtor, subsequent transfer of all assets and liabilities of debtor corporation to newly formed corporation having same shareholders, officers and directors as debtor did not constitute "sale, exchange, or other disposition" of secured property within meaning of UCC § 9-306(2); thus, financing statement which was properly filed continued to be effective after transfer of assets and liabilities, although no amendment to financing statement was made to reflect change in name of debtors, where name change was minor and not seriously misleading, and financing state-

ment was accurate in every other detail. In re Kittyhawk Tel. Corp., 75 Ohio Op. 2d 469, 516 F.2d 24 (6th Cir. Ohio 1975).

Where secured party entered into security agreement with partnership engaged in appliance business, covering "all present inventory belonging to the Dealer as well as any and all subsequently acquired inventory," where partnership assets were subsequently transferred to newly formed corporation, and where new financing statement was filed under name of partnership but was not filed with reference to corporation as debtor, security agreement containing after-acquired property clause was effective against newly-formed corporation and secured party's security interest extended to inventory subsequently acquired by corporation; fact that financing statement was filed under partnership name, "Clint's Appliance Sales and Service," rather than corporate name, "Clint's Appliance Sales and Service, Inc.," would not cause secured party's security interest to be unprotected against either corporation or trustee in bankruptcy; but, even if it could be said that financing statement was in some way misleading, under UCC § 9-402(7) (1972 Official Text) secured party's security interest remained perfected under its financing statement with partnership at least four months after partnership changed its "name, identity or corporate structure." *Fliegel v. Associates Capital Co.*, 272 Or. 434, 537 P.2d 1144 (1975).

Secured creditor who had knowledge at time of execution of security agreement that debtor contemplated at future time changing its name to particular new name, but who nevertheless proceeded to extend credit knowing that original filing of financing statement would not reflect change and would therefore mislead and deceive potential creditors and purchasers, forfeited his protected interest when change of name occurred. In re Kalamazoo Steel Process, Inc., 503 F.2d 1218 (6th Cir. Mich. 1974).

In action between secured party and trustee in bankruptcy over rights to forestry equipment in possession of secured party, financing statement signed by corporation, whose separate existence had

already ended by merger at time of signing, was sufficient to perfect security interest of corporation into which it was merged under UCC § 9-402 since statement was sufficient to put potential creditors on notice of prior security interest. In re Wilco Forest Mach., Inc., 491 F.2d 1041 (5th Cir. Ala. 1974).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. In re Pasco Sales Co., 77 Misc. 2d 724 (1974).

15. Signatures of parties, generally.

Where neither party has perfected his security interest, UCC § 9-312(5) determines priority between conflicting interests in same collateral; thus, where plaintiff-landlord had lien on tenant's property under terms of recorded lease which was valid under UCC § 9-204(3), but which was not perfected due to plaintiff's failure to file financing statement with secretary of state as required by UCC § 9-401(1)(c), and where defendant sold bar equipment to plaintiff's tenants under conditional sales contract and acquired purchase money security interest under UCC § 9-107(a), which was not perfected under UCC § 9-302(1) since defendant failed to obtain signatures of parties as required by UCC § 9-402(1), and where defendant subsequently repossessed and sold property in question, defendant's security interest took priority over plaintiff's either under theory that defendant perfected its security interest by repossessing and selling property or under theory that defendant's security interest attached prior to plaintiff's. *Engelsma v. Superior Prods. Mfg. Co.*, 298 Minn. 77, 212 N.W.2d 884 (1973).

The formal requisites of a financing statement include no provisions for a witness. *Myers v. F & M Bank*, 125 Ga. App. 123, 186 S.E.2d 592 (1971).

Under the California statute, from which subsection 5 was omitted, it is mandatory that the signatures of both parties

appear on an assignment of accounts receivable if it is to be valid as against the claim of the assignor's trustee in bankruptcy. *Wilshire Oil Co. v. Costello*, 348 F.2d 241 (9th Cir. Cal. 1965).

16. Signatures; particular applications.

Where (1) indemnity company, which had bound itself as surety for construction company, required construction company to execute general indemnity agreement as prerequisite to execution by indemnity company of performance and material-payment bonds, and (2) indemnity company, as against priority of claims of other creditors of construction company, based priority of its claim on financing statement that had been filed with indemnity agreement stapled to it, court held (1) that under UCC § 9-402(1), since filed financing statement did not contain debtor's signature, and indemnity agreement, which had been filed as security agreement, did not contain secured party's signature, debtor's signature on security agreement did not cure defect arising from its failure to sign financing statement, and secured party's signature on financing statement similarly did not cure defect arising from its failure to sign security agreement, (2) that such defects were not cured by stapling financing statement and security agreement together and filing them as one instrument, and (3) that as a result, indemnity company did not perfect its lien. *Travelers Indem. Co. v. First Nat'l Bank*, 368 So. 2d 836 (Miss. 1979).

Where (1) debtor executed security agreement giving creditor security interest in specified collateral and such security interest was perfected on April 5, 1971 by filing of financing statement sufficient under UCC § 9-402(1), (2) debtor on August 23, 1972 filed voluntary petition in bankruptcy and was thereafter adjudicated a bankrupt, (3) on September 19, 1972, two wholly owned subsidiaries of creditor assigned to creditor their unsecured claims against debtor, (4) debtor's equipment and inventory were sold pursuant to court order, and (5) creditor and both of its subsidiaries applied for payment of their claims from sale's proceeds, secured creditor was entitled to have its

valid claim paid from such proceeds. However, secured creditor's subsidiaries, which had contended that after postbankruptcy assignment of their claims to secured creditor they held perfected security interests in debtor's collateral by virtue of creditor's security agreement with debtor and creditor's filing of financing statement, were not entitled to have their claims satisfied from sale's proceeds, since they were not designated as secured parties in creditor's security agreement with debtor and also did not sign or have their addresses on creditor's filed financing statement, as required by UCC § 9-402(1). *Republic Nat'l Bank v. Fitzgerald*, 565 F.2d 366 (5th Cir. Tex. 1978).

Under Florida law financing statement signed by original debtor and assignee of original secured party may function to perfect series of properly attached security agreements which in fact placed parties in position of debtor and secured party, even though no financing statement signed by original debtor and original secured party had been properly filed. *Bramble Transp., Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97 (Del. Super. 1971), *aff'd*, 294 A.2d 104 (Del. 1972).

A financing statement executed on behalf of corporate debtor by a duly authorized officer who failed to show the capacity in which he signed, which was indexed solely in the names of the corporate creditor and debtor, substantially complied with the provisions of this section. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

17. —Signature of secured party.

Holder of security interest in form of chattel mortgage on herd of cattle took priority over holder of judgment lien who attempted to levy execution on cattle, although financing statement filed by secured party omitted signature and also omitted addresses of both secured party and debtor: (1) lack of secured party's signature from financing statement was minor error and financing statement with that omission, nevertheless, was in substantial compliance with UCC § 9-402(1); and (2) absence of addresses of both debtor and secured party did not render financing statement ineffectual where all

parties involved were residents of same small town, holder of judgment lien knew both debtor and secured party and where each of them lived, and there was no showing of prejudice to holder of judgment lien. *Riley v. Miller*, 549 S.W.2d 314, 100 A.L.R.3d 385 (Ky. Ct. App. 1977).

Signature requirement of UCC § 9-402 was satisfied by financing statement which contained handwritten name of corporate creditor in space labeled "Secured Party," notwithstanding fact that no agent of corporation signed statement, since signed name of creditor concealed nothing which might defeat purposes of Code, and financing statement as filed and available to subsequent prospective creditors of debtor would not have misled them in any significant manner, and action would have been denied no information material to making intelligent decisions regarding extending credit to debtor. *In re Sport Shack*, 383 F. Supp. 37 (N.D. Cal. 1974).

A security agreement, as distinguished from a financing statement, is not invalid because it is signed only by the debtor and not by the creditor or lending party. *National-Dime Bank v. Cleveland Bros. Equip. Co.*, 20 Pa. D. & C.2d 511 (1959).

18. —Signature of debtor.

Security interest is not rendered invalid by lack of collateral owner's signature on financing statement where name and signature of debtor are present, since minor errors which are not seriously misleading are excused. *United States Small Bus. Admin. v. Guaranty Bank & Trust Co.*, 874 F.2d 997 (5th Cir. 1989).

Creditor's filing of financing statement without debtor's signature, several months subsequent to lapse of original financing statement, was sufficient to renew perfection of security interest effective as of date of filing of second financing statement; however, the creditor was not protected during interim period between date of lapse and date of refile. *In re Abell*, 66 B.R. 375 (Bankr. N.D. Miss. 1986).

The absence of a checkmark on a financing statement to show the debtor had authorized filing without her signature did not impair the creditor's security interest, where the statement was otherwise sufficient. *Beneficial Fin. Co. v.*

Kurland Cadillac-Oldsmobile, Inc., 32 A.D.2d 643 (2d Dep't 1969).

Under New York Code § 9-402(2)(c) (subsection not contained in "official" or "uniform" version of Code) financing statement, indicating that filing without debtor's signature was authorized, was properly treated as proof that security agreement did in fact authorize such filing. *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

19. —Signatures on behalf of corporate or partnership parties.

Financing statement that was signed by only one member of partnership debtor was "signed by the debtor" within meaning of UCC § 9-402(1), since purpose of filed financing statement is only to provide notice and not to possess legal sufficiency of security agreement or other contract. *In re Hammons*, 438 F. Supp. 1143 (S.D. Miss. 1977), rev'd on other grounds, 614 F.2d 399 (5th Cir. 1980).

Financing statement filed by secured party sufficiently complied with UCC § 9-402(1) where secured party named partnership as debtor by entering in space on financing statement labeled "debtor" the words "Zondel Gardner, a partnership," since (1) under Uniform Commercial Code, partnership is legal entity and can be debtor, and (2) filed financing statement in suit was signed by member of debtor partnership in his capacity as partner. *Gulf Nat'l Bank v. Franke*, 563 F.2d 766 (5th Cir. 1977).

Financing statement was not "signed by the debtor" as required by UCC § 9-402(1), where debtor was "P. S. C. Products Corporation" and where statement was signed by officer of debtor corporation under legend which identified debtor as "Pacific Supply Co., division of P. S. C. Products Corp." *In re Pasco Sales Co.*, 52 A.D.2d 138 (2d Dep't 1976).

Financing statement which gave name of debtor on line one as "Taylor, Maxime" and carried signature of debtor on line nine as "Green Mill Inn, Inc., by Maxime Taylor, President" substantially complied with statutory requirements, where office of Secretary of State was able, through cross-indexing, to locate filing in both corporate and individual names, and actual

notice was thus available to anyone interested in filing. *In re Green Mill Inn, Inc.*, 474 F.2d 14 (9th Cir. Cal. 1973).

In an action for conversion by seizure and sale of property covered by security agreement allegedly void presented triable issues of fact as to the validity of the agreement, precluding summary judgment, where agreement was undated, did not specify the amount of the debt, or the terms of repayment and was signed by an individual in his own name and not in his capacity as an officer or the debtor corporation but the agreement did name the debtor corporation in the body thereof, listed the collateral covered by it, and the individual signing it was in fact the president of the debtor authorized to sign. *Cherno v. Bank of Babylon*, 57 Misc. 2d 801 (1968).

Individual's signature on financing statement, without any indication that he had signed as representative of debtor corporation was "not seriously misleading" within Code § 9-402(5), where financing statement was filed solely under corporate name; where corporation had as part of its name surname of signor; and where no prior financing statements executed by signor or changes in corporate organization might mislead third parties. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

20. —Requirement of manual signature.

Code requirement of manual signature was deleted by amendment adopted three months after filing of financing statement bearing machine signature; held, amendment dispensing with requirement of manual signature should be given retroactive or curative effect as remedial or procedural legislation, since it is of no substantive consequence to debtor or other creditors whether signature is manual or printed. *In re Colorado Mercantile Co.*, 299 F. Supp. 55 (D. Colo. 1969).

Where a creditor's assistant treasurer intended to sign a financing statement but through inadvertence filed the statement without signing it, the typed words of the creditor's name were not an intended use of a symbol as a signature and the financing statement was not "signed" within the

Code § 1-201(39) definition nor within the Code § 9-402(1) requirement even though a search of the town clerk's records would have disclosed the unsigned financing statement and the name and address of the secured party as typed in the blank space, the "unsigned" statement did not "substantially comply" with the Code requirements under § 9-402(5). *Maine League Fed. Credit Union v. Atlantic Motors*, 250 A.2d 497 (Me. 1969).

21. Addresses of parties, generally.

Under UCC § 9-402(1), a financing statement must include the name and address of the debtor. In this connection, however, the term "debtor" is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

A financing statement which fails to give the address of the secured party is fatally defective. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

22. Addresses; particular applications.

Fact that financing statement filed by secured party listed as debtors' mailing address only "Jackson, Mississippi 39208," while security agreement itself gave their address as "Route 4, Box _____, Jackson, Mississippi 39208," did not constitute such deficiency as to prevent perfection of valid security interest. *In re Bankrupt Estate of Smith*, 508 F.2d 1323 (5th Cir. 1975).

Holder of security interest in form of chattel mortgage on herd of cattle took priority over holder of judgment lien who attempted to levy execution on cattle, although financing statement filed by secured party omitted signature and also omitted addresses of both secured party and debtor: (1) lack of secured party's signature from financing statement was minor error and financing statement with that omission, nevertheless, was in substantial compliance with UCC § 9-402(1); and (2) absence of addresses of both debtor and secured party did not render financing statement ineffectual where all

parties involved were residents of same small town, holder of judgment lien knew both debtor and secured party and where each of them lived, and there was no showing of prejudice to holder of judgment lien. *Riley v. Miller*, 549 S.W.2d 314, 100 A.L.R.3d 385 (Ky. Ct. App. 1977).

In litigation involving conflicting claims by plaintiff and defendants of interest in trade fixture, defendants could not successfully assert that plaintiff's security interest had not been perfected as result of failure of security agreement, as filed, to include debtor's or secured party's mailing address as required by UCC § 9-402, where address as disclosed in agreement, as filed, substantially complied with statutory requirement, and defendants made no showing that they examined filed agreement or that they were misled by allegedly defective addresses. *Goldie v. Bauchet Properties*, 15 Cal. 3d 307, 540 P.2d 1, 99 A.L.R.3d 794 (1975).

In action between lender claiming security interest in inventory of mobile home dealer and mobile home manufacturer who had sold unit to debtor, lender's failure to include debtor's chief business address in financing statement was not "seriously misleading" and did not render statement invalid where statement was in substantial compliance with statutory requirements and where manufacturer failed to inspect security agreement or financing statement on file before shipping unit to debtor. *GECC v. Aurora Mobile Homes, Inc.*, 37 Cal. App. 3d 1016 (4th Dist. 1974).

Where financing statement contained creditor's name and address, debtor's name, mailing address, trade name, and address of his chief place of business and description of mortgaged property which consisted of machinery and equipment located at debtor's chief place of business at address given in financing statement, finding that omission of debtor's residence address could not have been misleading to creditors was not clearly erroneous. *Lines v. Bank of Cal.*, 467 F.2d 1274 (9th Cir. Cal. 1972).

It is unnecessary to set forth the address where collateral is to be located, in the description of collateral, whenever it is obvious or readily inferable that the

type of collateral covered would naturally be located in those places where the debtor does business. In *re Nickerson & Nickerson, Inc.*, 329 F. Supp. 93 (D. Neb. 1971), *aff'd*, 452 F.2d 56 (8th Cir. Neb. 1971).

Financing statement gave address as "Box 2146, Fort Worth, Texas:" held, this was in substantial compliance with Code where information concerning secured interest could be obtained from this information. *Silver v. Gulf City Body & Trailer Works*, 432 F.2d 992 (5th Cir. Ala. 1970).

Financing statement filed with Secretary of State was incomplete in that it did not contain address of either secured party or debtor; held, statement was nonetheless valid where no prejudice was shown to interest of general creditors who admitted having made no inquiry of Secretary of State as to what property of bankrupt was subject to liens. In *re French*, 317 F. Supp. 1226 (E.D. Tenn. 1970).

Omission of addresses of debtors from filing statement was not fatal under Code § 9-402(1), where addresses were readily available and known to virtually all creditors. *Rooney v. Mason*, 394 F.2d 250 (10th Cir. Wyo. 1968).

23. —Effect of change of address.

Financing statement covering all inventory and after-acquired inventory and containing address of debtor's corporate offices and principal place of business covered all debtor's stores, and did not require amendment as store locations periodically changed. In *re Little Brick Shirthouse, Inc.*, 347 F. Supp. 827 (N.D. Ill. 1972).

The Court cannot believe that a Kansas court would require a creditor to amend a financing statement simply because the debtor changed his address at a later date, so as to comply with the requirements of UCC § 9-402. In *re McCoy*, 330 F. Supp. 533 (D. Kan. 1971).

24. Description of collateral, generally.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies

with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description requirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Purpose of filing financing statement is notice to any third party; and requirement of description of collateral is satisfied if description reasonably informs third parties that certain identifiable item belonging to or in possession of debtor may be subject to prior security interest and that further inquiry is necessary to determine if it is exact item being offered them as collateral. *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala. App. 523, 274 So. 2d 80 (Civ. App. 1973).

It is unnecessary to set forth the address where collateral is to be located, in the description of collateral, whenever it is obvious or readily inferable that the type of collateral covered would naturally be located in those places where the debtor does business. In *re Nickerson & Nickerson, Inc.*, 329 F. Supp. 93 (D. Neb. 1971), *aff'd*, 452 F.2d 56 (8th Cir. Neb. 1971).

A financing statement is sufficient if it indicates the types or describes the items of collateral. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

25. Description; particular applications.

In suit by debtor's receiver challenging bank's priority as perfected security interest holder and its concomitant right to take possession and dispose of secured collateral, UCC § 9-402 did not require bank to give notice to debtor's creditors that original security agreement was amended to increase amount of its loan and terms of repayment where increased loan was secured by same collateral originally described in financing statement. *Heights v. Citizens Nat'l Bank*, 463 Pa. 48, 342 A.2d 738 (1975).

In view of Code provisions in which only distinction between non-fixture and fixture financing statements was provision that in latter instance financing statement "must also contain description of real estate concerned," it must be concluded that legislature intended that real estate description be mandatory, and in its absence security interest in fixtures was not perfected so as to affect parties other than parties to transaction. *Home Sav. Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386 (Tex. Civ. App. 1972), *writ ref'd n.r.e.*, (Apr. 18, 1973).

26. —After-acquired property.

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commer-

cially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Where security agreement was dated August 10 and financing statement describing collateral as "all accounts, contract rights and chattel paper now owned or hereafter acquired" was filed on August 11, second security agreement dated December 7, in which debtor agreed to delivery continuing guarantees from its principals in amount of \$150,000 rather than \$125,000 as provided in August 10 security agreement was perfected, and financing statement previously filed must be applied to it. *Richmond Crane Rigging & Drayage Co. v. Liberty Nat'l Bank*, 27 Cal. App. 3d 968 (1st Dist. 1972).

Financing statement covering "all equipment, cash registers...used in operating of service stations at...900 block South Main, Sapulpa, Oklahoma" included after-acquired property at service station even though statement did not contain an after-acquired property clause. *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

Financing statement covering "motor vehicles" is sufficiently specific under Code § 9-402(1) to perfect security interest of bank loaning money on chattel mortgage for three named automobiles; adding words "after acquired", while advisable, is not necessary where debtor is retail auto agency obviously buying and selling autos. *Bank of Utica v. Smith*

Richfield Springs, Inc., 58 Misc. 2d 113 (1968).

Where bank held a security interest in debtor's inventory and accounts receivable currently owned and thereafter to be acquired, the financing statement reasonably identified the collateral which was described as "inventory and accounts receivable," and the omission of the word "future" was immaterial. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

The description in a financing statement that the collateral is "inventory" is sufficient to warn prospective creditors of the borrower that it may well include after-acquired property. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

Where a finance company made a loan to a luncheonette owner who signed a security agreement conveying to the finance company as collateral the business together with all its good will, fixtures, equipment and merchandise, the agreement providing that the fixtures consisted of certain enumerated items "together with all property and articles now, and which may hereafter be, used or mixed with, added or attached to, and/or substituted for, any of the foregoing described property", and where the finance company filed a financing statement which set forth the specific items enumerated in the security agreement but made no reference to after-acquired property, and where subsequent to the filing of the financing statement a cash register was delivered to the luncheonette owner under a conditional sales agreement but no financing statement covering the cash register was filed by the seller within ten days after delivery, it was held that under the system of notice filing adopted by the Code, as disclosed by subsection (1) of the instant section, the financing company's financing statement gave adequate notice of its security agreement with the after-acquired property clause contained therein, and that the financing statement covered the cash register as after-acquired property even though the cash register was not specifically referred to either in the security agreement or in the financing statement. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

27. —Accounts receivable.

“Accounts receivable” is adequate financing statement description of EOA contract within UCC § 9-402. In re Varney Wood Prods., Inc., 458 F.2d 435 (4th Cir. Va. 1972).

Properly filed financing statements describing collateral as “accounts receivable” adequately described debtor’s contracts and accounts for purpose of perfecting security interest therein. Walker Bank & Trust Co. v. Smith, 88 Nev. 502, 501 P.2d 639 (1972).

Description of collateral as “inventory and accounts receivable”, without including descriptive word “future”, is sufficient under Code § 9-402(1). In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

28. —Accuracy of description of single item of collateral.

Where security agreement and financing statement described collateral as watch and also identified watch by brand and model number, description of collateral was sufficient under UCC § 9-110; where security agreement described second item of collateral as, “ladies’ bridal set white gold,” but financing statement described collateral as, “one ladies’ bracelet set-white gold,” description of collateral in security agreement was sufficient to create security interest but description in financing statement did not reasonably identify collateral and thus secured party did not have perfected security interest in bridal set. DWG, Inc. v. Peltier, 563 P.2d 152 (Okla. 1977).

Security agreement and financing statement adequately described collateral as required by UCC §§ 9-203, 9-402, and 9-110 where, although secured party had erroneously omitted first digit of identification number of automobile, omitted digit represented information previously described in words on each document. City Bank & Trust Co. v. Warthen Serv. Co., 91 Nev. 293, 535 P.2d 162 (1975).

Financing statement did not sufficiently describe drilling rig so as to reasonably notify plaintiff of existence of prior lien, where it contained no reference to self-propelling equipment, but, according to custom of industry, described merely stationary piece of equipment with deisel engine to operate it. Ray v. City Bank &

Trust Co., 36 Ohio Misc. 83, 358 F. Supp. 630 (S.D. Ohio 1973).

Use of “COF” along with year and serial number was sufficient financing statement description of model of tractor known as “cab over tandum”. In re Richards, 455 F.2d 281 (6th Cir. Mich. 1972).

Financing statement describing automobile by year, maker, and model was not fatally defective under Code § 9-402(1) because of one digit mistake in eleven digit serial number, since error was “not seriously misleading” within Code § 9-402(5). Bank of N. Am. v. Bank of Nutley, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

The description of a caterpillar scraper by an incorrect serial number is sufficient in the absence of some physical description appearing of record in the security instrument which provides a key to the identity of the property. Yancey Bros. Co. v. Dehco, Inc., 108 Ga. App. 875, 134 S.E.2d 828 (1964).

29. —Crops.

Catfish raised by fish farmers did not qualify as “crop” for purpose of Section 75-9-203 and this section. Sunburst Bank v. Findley, 76 B.R. 547 (Bankr. N.D. Miss. 1987).

Where bank negligently failed to perfect its security interest in growing corn crop by omitting description of real estate as required by UCC § 9-402, thereby causing said collateral to be subordinated to interest of third party, this constituted an unjustifiable impairment of such collateral and served to discharge accommodation party from liability to extent of such impairment of collateral under UCC § 3-306. First Sec. Bank & Trust Co. v. Voelker (In re Estate of Voelker), 252 N.W.2d 400 (Iowa 1977).

Description of collateral as crops and “proceeds” from crops was sufficient to include federal subsidy payments to which debtor became entitled. In re Munger, 495 F.2d 511 (9th Cir. Cal. 1974).

In action between competing secured creditors over proceeds from debtor’s crops, UCC § 9-402 requirement that collateral be adequately described was met where subsequent lender had actual knowledge of prior claim of security inter-

est in debtor's property and crops; under UCC § 9-204(4), providing that no security interest attaches under after-acquired property clause to crops which become such more than one year after security agreement is executed, subsequent lender had burden of proving that crops in question were not planted until more than one year after original security agreement was executed. *First Sec. Bank v. Wright*, 521 P.2d 563 (Utah 1974).

Secured party was not entitled to recover from purchasers of crops covered by security agreement, where financing statement merely referred to debtor's 1967 peanut crop, which was in several counties on many different properties, and was insufficient to identify security described; although financing statement need not contain formal metes and bounds or other legal description of real property on which crops subject to security interests are grown, it must contain some description of real estate by which exact crops constituting secured property can be reasonably identified and any description which reasonably identifies "real estate" is sufficient to meet "notice filing" theory of UCC. *First Nat'l Bank v. Calvin Pickle Co.*, 516 P.2d 265, 67 A.L.R.3d 302 (Okla. 1973).

Where financing statement and security agreement purportedly gave secured party security interest in all of debtor's crops, but contained accurate legal description of certain farm lands belonging to debtor and omitted 3 other parcels of land on which debtor planted and harvested crops, crop description was insufficient to put third person on notice under UCC. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972).

Although §§ 9-402 and 9-110 were intended by legislature to require something less than legal description of land to apprise purchasers and creditors of security interest in growing crops, financing statement which described realty on which crops were raised as "land owned or leased by debtor in Cherokee County, Kansas" was insufficient to perfect security interest in such crops. *Chanute Prod. Credit Ass'n v. Weir Grain & Supply, Inc.*, 210 Kan. 181, 499 P.2d 517 (1972).

30. —General terms of description.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description requirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Secured party's security interest in debtor's inventory was not perfected where description in financing statement required by UCC § 9-402(1) described collateral as "all accounts and contracts owned by the debtor or arising from the sale of inventory," since secured party could perfect security interest only in types of collateral listed on financing statement and under UCC § 9-105(1)(f), neither the term "accounts" nor the term "contracts" included inventory. *Gulf Nat'l Bank v. Franke*, 563 F.2d 766 (5th Cir. 1977).

Financing statement containing signatures of debtor and secured party, address of secured party, and containing description of collateral: "All Olivetti Corp. of America copying machines which have been delivered but not paid in full" met sufficiency test of description of collateral

under UCC § 9-110 and formal requisites of financing statement under UCC § 9-402 and description reflected security interest under UCC § 1-201(37). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Tools are ordinarily defined as implements used by hand, and use of words "tilling and harvesting tools" in financing statement did not accurately describe power-driven farm machinery such as mower, reaper, fertilizer, so as to perfect security interests in those items. *In re Anselm*, 344 F. Supp. 544 (W.D. Ky. 1972).

A filed financing statement covering "motor vehicles" is sufficiently specific under UCC § 9-402 to perfect the security interest of a bank loaning on a chattel mortgage for three named automobiles as opposed to an interest of the seller of the automobiles to receive payment for those cars because of a worthless check. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

31. —General terms of description; "consumer goods".

Reclamation petition filed by secured creditor of bankrupt was improperly denied where financing statement describing collateral as all consumer goods and personal property of all kinds and description located at debtor's address was adequate under UCC § 9-402(1). *In re Turnage*, 493 F.2d 505 (5th Cir. Ala. 1974).

Use of term "consumer goods" is too broad, general, and meaningless to fulfill code mandate that financing statement indicates "types" of collateral; therefore, security interest of lender in tape deck, speaker, and 21-inch portable television was void. *In re Lehner*, 303 F. Supp. 317 (D. Colo. 1969), *aff'd*, 427 F.2d 357 (10th Cir. Colo. 1970).

32. —General terms of description; "equipment".

Under UCC § 9-402(1) and UCC § 9-110, term "farm equipment" was sufficiently specific description of tractor to perfect security interest therein of federal Farmers Home Administration (FHA), since any reasonable third party who might consider accepting tractor as collateral would receive ample notice from secured party's filed financing statement

that further inquiry was in order. *United States v. Crittenden*, 563 F.2d 678 (5th Cir. Ga. 1977), *reh'g denied*, 568 F.2d 1368 (5th Cir. Ga. 1978), vacated on other grounds, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), on remand, 600 F.2d 478 (5th Cir. Ga. 1979).

General description of collateral, which consisted of debtor's farming equipment, in financing statement filed by bank as "all equipment now owned or hereafter acquired by debtor," without indicating location of such equipment or its nature as farming equipment, was inadequate under UCC § 9-402(1) and § 9-110, and did not perfect bank's lien in collateral, so as to render it superior to right to collateral of trustee in bankruptcy. *In re Werth*, 443 F. Supp. 738 (D. Kan. 1977).

Under UCC § 9-402(1), description in filed financing statement of equipment constituting collateral adequately described collateral where financing statement, although it did not refer to repairs, replacement parts, and accessions to collateral as did security agreement itself, did refer to "pallet-mill operation and manufacturing equipment." *National Acceptance Co. of Am. v. Doede*, 78 F.R.D. 333 (W.D. Wis. 1978).

Unlike a financing statement which is designed merely to put creditors on notice that further inquiry is prudent, a security agreement embodies the intentions of the parties and is the primary source to which a creditor's or potential creditor's inquiry is directed and must be reasonably specific; thus term "equipment" in omnibus clause of security agreement did not include automobiles owned by bankrupt corporation. *In re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Where on financing statement read "logging equipment and machinery used in logging operations" and another financing statement read "new and used equipment for logging and general construction", descriptions were sufficient to describe property so as to create valid lien on log-loader in question. *Mountain Credit v. Michiana Lumber & Supply, Inc.*, 31 Colo. App. 112, 498 P.2d 967 (1972).

Description, "equipment of all kinds", in financing statement was sufficiently informative as to constitute notice required by

UCC § 9-402(1). *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972).

Financing statement covering "all equipment, cash registers...used in operating of service stations at...900 block South Main, Sapulpa, Oklahoma" included after-acquired property at service station even though statement did not contain an after-acquired property clause. *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

33. —General terms of description; "personal property".

Description in financing statement, "all personal property", was not sufficient to perfect security interest against trustee in particular items of livestock and farm equipment set out in unrecorded security agreement. *In re Fuqua*, 330 F. Supp. 1050 (D. Kan. 1971), *aff'd*, 461 F.2d 1186 (10th Cir. Kan. 1972).

34. —Inventory.

In junior mortgagee's action for damages for defendant's alleged impairment of plaintiff's security, where defendant under security agreement with dealer in modular homes had security interest in all of dealer's present or future inventory and also first mortgage on 2.39 acres of land acquired by dealer for use as sales lot, on which dealer installed two modular homes; where plaintiff held second mortgage on dealer's 2.39 acres as security for loan on which dealer defaulted; and where defendant after dealer's default quickly removed modular homes from dealer's lot pursuant to written authorization from officer of dealer's company, (1) homes placed by dealer on sales lot, although installed on concrete foundations and connected to utilities, were inventory and not real property or fixtures under UCC § 9-109 (4), since they were goods intended for immediate or ultimate sale; (2) defendant held perfected purchase-money security interest in dealer's inventory under UCC § 9-401(1)(c) and UCC § 9-402(1), which under UCC § 9-312(3) took priority over plaintiff's junior-mortgage interest; and (3) defendant on dealer's default had right to take possession of homes on dealer's lot, since they were inventory collateral.

Rakosi v. GECC, 59 A.D.2d 553 (2d Dep't 1977).

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Description of collateral as "inventory and accounts receivable", without including descriptive word "future", is sufficient under Code § 9-402(1). *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

The description in a financing statement that the collateral is "inventory" is sufficient to warn prospective creditors of the borrower that it may well include after-acquired property. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

35. Minor errors.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description re-

quirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Holder of security interest in form of chattel mortgage on herd of cattle took priority over holder of judgment lien who attempted to levy execution on cattle, although financing statement filed by secured party omitted signature and also omitted addresses of both secured party and debtor: (1) lack of secured party's signature from financing statement was minor error and financing statement with that omission, nevertheless, was in substantial compliance with UCC § 9-402(1); and (2) absence of addresses of both debtor and secured party did not render financing statement ineffectual where all parties involved were residents of same small town, holder of judgment lien knew both debtor and secured party and where each of them lived, and there was no showing of prejudice to holder of judgment lien. *Riley v. Miller*, 549 S.W.2d 314, 100 A.L.R.3d 385 (Ky. Ct. App. 1977).

Filing requirements of Georgia Uniform Commercial Code are analogous to requirements for certificate-of-title applications under Georgia Motor Vehicle Certificate of Title Act, since both laws require filing of security interests to give notice to both future creditors of debtor and to potential buyers of collateral involved. *Roberts v. International Harvester Credit Corp.*, 143 Ga. App. 206, 237 S.E.2d 697 (1977).

Identification of debtor, "Southern Supply Company of Greenville, N.C., Inc.," in financing statements as "Southern Supply Co." was not "seriously misleading" within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *Matter of Southern Supply Co. of Greenville, North Carolina, Inc.*, 1975, 405 F. Supp. 20.

Filing of financing statement under assumed trade name was effective unless it was misleading to creditors. *Siljeg v. Na-*

tional Bank of Commerce, 509 F.2d 1009 (9th Cir. Wash. 1975).

Failure of finance company to check box opposite provision that debtor had signed security agreement authorizing finance company to file statement was minor error which could not seriously mislead one who searched file; held, financing statement was effective. *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc.*, 32 A.D.2d 643 (2d Dep't 1969).

Individual's signature on financing statement, without any indication that he had signed as representative of debtor corporation was "not seriously misleading" within Code § 9-402(5), where financing statement was filed solely under corporate name; where corporation had as part of its name surname of signor; and where no prior financing statements executed by signor or changes in corporate organization might mislead third parties. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

Where the names of the mortgagors and mortgagees and their respective addresses were typed in the appropriate boxes appearing in the form of financing statement, and the statement is signed by the mortgagors at the bottom of the form, the absence of the mortgagee's signature constituted only a minor error which was not seriously misleading. *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. Conn. 1965).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. *In re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. Conn. 1965).

Under the provisions of subsection (5) of the instant section, a financing statement which substantially complies with the requirements of the section is sufficient even though it contains minor errors which are not seriously misleading. Thus, where the debtor was described as "Carroll, Edmund d/b/a Cozy Kitchen 574 Wash St Canton, Mass" and the word "Cozy" should have been "Kozy", it was held that the name of the debtor was accurately stated and the error in the name under which he did

business was a minor error which was not seriously misleading. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

In *Sales Finance Corp. v. McDermott Appliance Co.* (1960) 340 Mass 493, 165 NE2d 119, it was said that the decision of the court that a minor variation in the name of the trustee in a statement of trust receipt financing filed under the former Uniform Trust Receipts Act did not render the statement ineffective was consonant with the provision of subsection (5) of the instant section that a financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. *Sales Fin. Corp. v. McDermott Appliance Co.*, 340 Mass. 493, 165 N.E.2d 119 (1960).

36. Security agreement as financing statement.

Although it is evident under UCC § 9-402 that one instrument may qualify as both security agreement and financing statement, from which it follows that financing statement may also constitute security agreement if it otherwise qualifies as such, where parties executed only promissory note in standard form and short form financing statements and where neither financing statements nor note manifested intent to create or provide for security interest, there was no security agreement as required by UCC § 9-203 and thus creditor did not acquire security interest. *Crete State Bank v. Lauhoff Grain Co.*, 195 Neb. 605, 239 N.W.2d 789 (1976).

Notice of sale agreement filed as financing statement satisfied Code § 9-402(1) requirement even though not indicating that there was underlying security interest involved. *Rooney v. Mason*, 394 F.2d 250 (10th Cir. Wyo. 1968).

Chattel mortgage may serve both as "security agreement" and "financing statement" under Nebraska UCC, provided it complies with requirements for said instruments, and contains necessary information, as set out in UCC; under UCC § 9-402, there are 2 formal requisites of "financing statement", i.e., (1) signatures and addresses of both parties, and (2) description of collateral by type or item,

and financing statement substantially complying with these requirements is effective even though it contains minor errors which are not seriously misleading; address of secured party to be set out in financing statement under UCC § 9-402 must be such address as to enable one interested in searching records to contact party in question for purpose of obtaining information concerning security interest, i.e., address must be sufficiently complete to enable prudent person using reasonable care to locate secured party, and question of sufficiency of address of secured creditor is question of fact; thus, where chattel mortgage filed as financing statement gave address of secured party as "Omaha, Nebraska," and there was nothing in record from which court could determine whether secured creditor was or was not listed in Omaha city directory or in Omaha telephone book, or whether any of interested parties had knowledge of address of secured creditor, or any other information which would have facilitated contacting secured creditor, address was insufficient to comply with requirements of UCC § 9-402. *Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co.*, 191 Neb. 74, 214 N.W.2d 18 (1974).

Lack of secured party's signature on chattel mortgage filed as financing statement does not make statement defective under Code § 9-402(1). *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

An instrument denominated as a "chattel mortgage" may be filed as a financing statement so long as it contains the necessary information. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

A conditional sales contract in proper form and timely filed with correct recording office has been filed in compliance with this section even though recorder erroneously returned instrument for an acknowledgment. *In re Mutual Bd. & Packaging Corp.*, 342 F.2d 294 (2d Cir. N.Y. 1965).

A chattel mortgage on bowling alley equipment, although unsigned by the debtor as is required by this section, was held valid as a financing statement when filed, and the court commented upon the

detailed nature of the information contained in the instrument and observing that § 1-102 requires a liberal interpretation of the Commercial Code added that a period of indulgence should be granted in connection with cases raising under the code. *Alloway v. Stuart*, 385 S.W.2d 41 (Ky. 1964).

37. Relationship between financing statement and security agreement.

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what

had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

That the financing statement may be filed prior to the making of a security agreement, and that a security interest need not be in existence at the time the financing statement is filed, is clearly contemplated under the provisions of this section. In *re United Thrift Stores, Inc.*, 242 F. Supp. 714 (D.N.J. 1965), *aff'd*, 363 F.2d 11 (3d Cir. N.J. 1966).

38. Effect of refinancing.

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Where financing statement covering first loan to debtor was filed and four subsequent refinancing loans were made with no new filing, each subsequent loan being secured by chattel mortgages on same property that served as collateral for first loan, security interests covering subsequent loans were perfected, even though financing statement was on file before security interests in subsequent loans attached; fundamental and reiterated policy of code is that sequence of steps necessary for perfection is immaterial. In *re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

There is no requirement that when a loan is refinanced that a new financing statement must be filed and the former statement cancelled for the reason that the filing statement is not a lien which is discharged by refinancing but is merely a notice that there is some security interest in the designated collateral. Hence the original statement stands and continues the priority of the security interest for the benefit of the refinanced obligation. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

39. Amendment or continuation of security agreement.

Security agreement entered into in February, 1974, which created valid security interest as between debtor and bank with respect to debtor's accounts receivable, was perfected by existence of record of financing statement, first filed in 1959 and kept current by timely filed continuation statements, filed at regular intervals (in each case just short of five years), showing debtor's accounts receivable as collateral, notwithstanding there were intervals when debtor owed bank nothing, during which time no security interest existed, and that from 1972 to February, 1974, parties did not intend bank's loans to be secured; duly filed financing statement, showing same debtor, same secured party, and same collateral, serves to perfect security interest created in transaction other than that for which financing statement was originally filed. *In re Gilchrist Co.*, 403 F. Supp. 197 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1246 (3d Cir. Pa. 1976).

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances

clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. *In re Pasco Sales Co.*, 77 Misc. 2d 724 (1974).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

A careful reading of UCC § 9-402(4) does not compel a finding that the financ-

ing statement must be amended when the security agreement is altered. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

It was not necessary for agreement to provide for extension or renewal of indebtedness in order that creditor have valid security interest in property covered by security agreement where maker had executed and delivered security agreement to payee containing no provision for renewal or extension of note, financing statement containing no maturity date was filed, maker made payment on original note and executed and delivered to payee renewal note which recited date of original loan and also referred to collateral for original loan, and maker failed to pay note when it became due. In *re Cantrill Constr. Co.*, 418 F.2d 705 (6th Cir. Ky. 1969), cert. denied, 397 U.S. 990, 90 S. Ct. 1124, 25 L. Ed. 2d 398 (1970).

40. Assignment of security interest of priority.

In receivership proceedings involving conflicting petitions to reclaim assets of insolvent corporation, secured party which had loaned money to insolvent and had performed every act required by law to obtain perfected security interest in all of insolvent's receivables, including filing of financing statement pursuant to UCC §§ 9-302(1), 9-304(1), and 9-402(1), had priority over all unsecured general creditors, including investors in the insolvent corporation who held debentures and notes which stated on their face that they were subordinate to claims of all other contract creditors. *Coastal Fin. Corp. v. Coastal Fin. Corp.*, 120 R.I. 317, 387 A.2d 1373 (1978).

Plaintiff's security interest in all present and future Medicaid and Medicare accounts receivable of ambulance company, which plaintiff perfected on May 11, 1972 by filing financing statement in accordance with UCC § 9-402, had priority over state tax warrant for sum owed by ambulance company for employee income-withholding taxes, which warrant was filed on October 8, 1975 and under which state tax department had levied on Medicaid payments owed to ambulance company by county department of social services. In such case, priority of plaintiff's

security-interest lien was not affected by state statute providing that assignment of claim of supplier of medical assistance was invalid as against any social services district since such statute, although prohibiting enforcement of plaintiff's assignment against any social services district, did not prohibit enforcement of such assignment as against any other person. *IMFC Professional Servs., Inc. v. State*, 59 A.D.2d 1047 (4th Dep't 1977).

Where 1966 loan was secured by assignment of contract right, where financing statement filed in 1966 was in compliance with UCC § 9-402(1) and where secured party made subsequent loans to debtor in 1967 and 1968, even if 1966 and 1967 notes did not contain future advance clauses, secured party maintained position of perfected secured creditor with respect to 1968 loan which was also secured by assignment of contract rights covered by 1966 note and financing statement. In *re Estate of Gruder*, 89 Misc. 2d 477 (1977).

Where automobile dealer sold automobile under retail instalment contract and assigned contract to bank with unconditional guarantee of payment, automobile dealer was subrogated to rights of bank in collateral, and where UCC § 9-402 required filing of financing statement in order to perfect security interest in such collateral, and where both parties failed to file such financing statement, dealer was entitled to be discharged to extent of any loss sustained by reason of bank's failure to file statement. *First Nat'l Bank v. Haugen Ford, Inc.*, 219 N.W.2d 847 (N.D. 1974).

41. Transfer of collateral by debtor.

Where (1) bank advanced loan guaranteed by Federal Small Business Administration, to owner of business, (2) bank secured loan by perfected security interest in all of debtor's furniture, fixtures, machinery, and equipment, (3) bank filed financing statement which listed debtor's corporation as debtor, and (4) such corporation, without knowledge or consent of bank or SBA as secured creditors, sold collateral subject to creditors' security interest to second corporation which became bankrupt and had its assets sold at public auction, court held (1) that bankruptcy

judge committed error in ruling that although bank and SBA did not impliedly or expressly consent to transfer of collateral to second corporation, failure of bank and SBA to file financing statement naming second corporation as debtor rendered bank's and SBA's previously perfected security interest ineffective against second corporation, and (2) that under Cal UCC § 9-306(2), stating that security interest continues in collateral notwithstanding its sale by debtor unless disposition was authorized by secured party, and Cal UCC § 9-402(6), providing that filed financing statement remains effective with respect to collateral transferred by debtor, even though secured party knows of or consents to such transfer, security interest of bank and SBA clearly survived subsequent transfer of collateral to second corporation. *United States v. Ocean Elecs. Corp.*, 451 F. Supp. 511 (S.D. Cal. 1978).

"Collateral" as used in third and final sentence of UCC § 9-402(7) is not limited

as it is in the second sentence, where it is defined as that collateral acquired by debtor more than four months after change in debtor's name. Instead, the final sentence speaks of collateral transferred by the debtor, which must mean the property subject to the security interest. The final sentence is clear that the filed statement remains effective with respect to collateral transferred by debtor, regardless of knowledge or consent of secured party. This also means collateral which consists of after-acquired property. In re *Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Where vendee of automobile, who was debtor of secured party who had failed to file financing statement under Code § 9-402, resold automobile to vendor, such subsequent sale vested title to automobile in vendor, superior to any claim of third party. *Dunford v. Columbus Auto Auction, Inc.*, 114 Ga. App. 407, 151 S.E.2d 464 (1966).

RESEARCH REFERENCES

ALR. Construction and application of statutory provisions respecting registration of mortgages on personal property in case of residence of other states. 10 A.L.R.2d 764.

Necessity and sufficiency of notice or statement prescribed by factor's lien law. 96 A.L.R.2d 727.

Sufficiency of description of crops under UCC §§ 9-203(b) and 9-402(1). 67 A.L.R.3d 308.

Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9-402. 99 A.L.R.3d 478.

Sufficiency of address of debtor in financing statement required by UCC § 9-402(1). 99 A.L.R.3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402(1). 99 A.L.R.3d 1080.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure. 99 A.L.R.3d 1194.

Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402. 100 A.L.R.3d 10.

Sufficiency of secured party's signature on financing statement or security agreement under UCC § 9-402. 100 A.L.R.3d 390.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402. 3 A.L.R.4th 502.

Am Jur. 8 Am. Jur. 2d, Bailments §§ 37, 27.

66 Am. Jur. 2d, Records and Recording Laws §§ 54 et seq., 82 et seq., 136 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 310, 329, 333, 343, 348, 350, 353, 358, 366, 369.

Formal requisites of financing statement; amendments, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:631-9:639.

Formal requirements of financing statement; amendments, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3651 et seq.

CJS. 8 C.J.S., Bailments § 22.

79 C.J.S., Secured Transactions §§ 65-80.

76 C.J.S., Records §§ 12, 30, 31, 57 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-503. Name of debtor and secured party.

(a) A financing statement sufficiently provides the name of the debtor:

(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

(A) Provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

(B) Indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

(4) In other cases:

(A) If the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

(b) A financing statement that provides the name of the debtor in accordance with subsection (a) is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subsection (a)(4)(B), names of partners, members, associates, or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one (1) debtor and the name of more than one (1) secured party.

SOURCES: Former 1972 Code § 75-9-503 [Codes, 1942, § 41A:9-503; Laws, 1966, ch. 316, § 9-503, eff March 31, 1968] is now found in comparable provisions enacted at § 75-9-609 by Laws, 2001, ch. 495, § 1. Present § 75-9-503 was derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-504. Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

- (1) A description of the collateral pursuant to Section 75-9-108; or
- (2) An indication that the financing statement covers all assets or all personal property.

SOURCES: Former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-610, 75-9-611, 75-9-615, 75-9-617, 75-9-618, and 75-9-624 by Laws, 2001, ch. 495, § 1. Present § 75-9-504 was derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(1).

6. In general; scope.
7. Purpose.
8. Sufficiency of financing statement, generally.
9. Description of collateral, generally.
10. Description; particular applications.
11. —After-acquired property.
12. —Accounts receivable.
13. —Accuracy of description of single item of collateral.
14. —Crops.
15. —General terms of description.
16. —General terms of description; “consumer goods”.
17. —General terms of description; “equipment”.
18. —General terms of description; “personal property”.
19. —Inventory.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(1).

6. In general; scope.

The Code adopts the system of notice filing under which it is contemplated that the complete state of affairs will be learned only after inquiry. *Bank of N. Am.*

v. Bank of Nutley, 94 N.J. Super. 220, 227 A.2d 535, 4 U.C.C. Rep. Serv. 56 (L. Div. 1967); *In re Platt*, 257 F. Supp. 478, 3 U.C.C. Rep. Serv. 719 (E.D. Pa. 1966).

Sections 65 and 70 of the New York Personal Property Law which provide the effect and method of filing conditional sales contracts have now been superseded by §§ 9-402 and 9-403(1) of the UCC. *In re Mutual Bd. & Packaging Corp.*, 342 F.2d 294 (2d Cir. N.Y. 1965).

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972,

even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Liability between the parties is created by the execution of a security agreement or other instrument, but no personal liability is created by the execution of a

financing statement. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

The provision of subsection (1) of the instant section that "a financing statement is sufficient if it is signed by the debtor and the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral" adopts the system of notice filing under which what is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

The Code adopts the notice system of filing which places the burden of further inquiry upon anyone seeking additional information. *Hartford Accident & Indem. Co. v. State Pub. Sch. Bldg. Auth.*, 26 Pa. D. & C.2d 717 (1961).

7. Purpose.

Although financing statement under UCC § 9-402(1) may be filed before security agreement is made or security interest otherwise attaches, financing statement standing alone does not create security interest in debtor's property, but merely serves notice that named creditor may have a security interest therein. Thus, where buyer of tractor did not execute security agreement granting security interest in tractor to seller, and where seller did not take possession of tractor when financing statement signed by buyer was executed, seller under UCC § 9-203(1)(a) and (b) had no valid security interest in tractor, even though financing statement was filed for record in office of county circuit clerk. *Gibbs v. King*, 263 Ark. 338, 564 S.W.2d 515 (1978).

Uniform Commercial Code § 9-402 adopts a system of "notice filing" which merely indicates that the secured party may have a security interest in the collateral described, the purpose of the filed statement being to give sufficient information necessary to put a searcher on inquiry, and the secured party has the duty to make sure of proper filing and indexing.

John Deere Co. v. William C. Pahl Constr. Co., 59 Misc. 2d 872 (1969), *aff'd*, 34 A.D.2d 85, 310 N.Y.S.2d 945 (4 Dep't 1970).

The purpose of the statute is to avoid the real estate type of closing where all parties go to the clerk's office, check the records, execute the financing statement and file it secure in the knowledge that the creditor has first priority. The statute was designed to allow a creditor to preempt first rights against the borrower. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

The purpose of filing is to put the public generally on notice of the prior interest in collateral so that inquiry can be made. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

Under the Code the financing statement merely gives notice that an identified person, the creditor, may have a security interest in certain property, the collateral, but does not require a filing of the security agreement. *HFC v. Bank Comm'r*, 248 Md. 233, 235 A.2d 732 (1967).

The purpose of the adoption of the notice filing system, under the first sentence of subsection (1) of the instant section, was to provide a method of protecting security interests which at the same time would give potential creditors and other interested persons information and procedures adequate to enable the ascertainment of the facts they need to know. Inasmuch as the adoption of this system reflects a decision of policy by the experts who framed the Uniform Commercial Code, the court will so interpret the statute as to carry out the intent of the framers of the Code. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

The purpose of the notice filing under this section is to give notice that the secured party who has filed may have a security interest in the collateral described, and that further inquiry will be necessary to disclose the complete state of affairs. *Annawan Mills, Inc. v. Northeastern Fibers Co.*, 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

8. Sufficiency of financing statement, generally.

Under California version of UCC § 9-402(1), requirement that trade name as

well as true name of debtor be included in financing statement was mandatory for perfection of security interest, despite fact that in particular case no creditor was actually misled by absence of trade name. *In re Thrift Shoe Co.*, 502 F.2d 1211 (9th Cir. Cal. 1974).

Filing in 1967 of financing statement covering debtors' crops was sufficient under Indiana law to perfect security interest in crops arising out of security agreement executed in 1968. *United States v. Gleaners & Farmers Coop. Elevator Co.*, 481 F.2d 104 (7th Cir. Ind. 1973).

Financing statements which did not contain correct name of debtor but listed debtor only by tradename used by debtor for his business did not substantially comply with statutory requirement and were fatally defective. *In re Thomas*, 466 F.2d 51 (9th Cir. Cal. 1972).

The necessity of stating the maturity date of the obligation secured is not among the enumerated steps required to make sufficient the financing statement; however, the insertion of "demand" would not seriously mislead a later party in his attempt to locate the underlying security agreement. *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 455 F.2d 141 (4th Cir. Md. 1970).

Under the UCC system of "notice" filing, the recorded statements indicated merely that the secured party of record may have a security interest in the collateral described, and further inquiry is necessary, as is stated in Comment 2 to UCC § 9-402, to disclose the complete state of affairs, or, otherwise stated, a financing statement discloses sufficient information if it enables any concerned creditor to contact the secured party or the claimant. *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971).

Identification of debtor, "Southern Supply Company of Greenville, N.C., Inc.," in financing statements as "Southern Supply Co." was not "seriously misleading" within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *Matter of Southern Supply Co. of Greenville, North Carolina, Inc.*, 1975, 405 F. Supp. 20

Failure of Connecticut certificate of title to auto to state date of security agreement

did not invalidate security interest in auto, absent any indication that omission misled trustee in bankruptcy or any creditor of bankrupt-owner of auto. In re Grandmont, 310 F. Supp. 968 (D. Conn. 1970).

Description of collateral in financing statement as consumer goods, personal property of all kinds and types, located on or about debtor's residence, not including household goods as defined in FTC rule, was sufficiently definite to permit perfection of security interest. In re Boykins, 120 B.R. 71 (Bankr. N.D. Miss. 1990).

Significance of error in financing statement, for purpose of determining whether it is seriously misleading, must be determined in light of what is "commercially reasonable." Pongetti v. Deposit Guar. Nat'l Bank (In re Strickland), 94 B.R. 898 (Bankr. N.D. Miss. 1988).

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant

third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). White Star Distribs., Inc. v. Kennedy, 66 A.D.2d 1011 (4th Dep't 1978).

Under UCC § 9-402(1), a financing statement must include the name and address of the debtor. In this connection, however, the term "debtor" is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. White Star Distribs., Inc. v. Kennedy, 66 A.D.2d 1011 (4th Dep't 1978).

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. Chrysler Credit Corp. v. Community Banking Co., 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Where chattel mortgage on trailer was defective under UCC § 9-402(1) as filed financing statement because it lacked both address of secured party and debtor's mailing address, chattel mortgagee's security interest was unperfected under § 9-302(1), and under UCC § 9-301(1)(b), judgment lien creditor, which had obtained judgment against chattel mortgagor, executed on such judgment, and seized trailer in suit, had priority to proceeds from trailer's sale. Cushman Sales & Serv. of Neb., Inc. v. Muirhead, 201 Neb. 495, 268 N.W.2d 440 (1978).

Where defendant bank made loan to debtor under name "Lee Anderson," took

security agreement on new automobile which was properly filed in county clerk's office and indexed under name of "Lee Anderson," but did not examine manufacturer's statement of origin, issued earlier to James Anderson, and took no steps to assure itself that car's title papers would be issued in name of Lee Anderson, where debtor applied for and received certificate of title in name of "James L. Anderson," and where plaintiff bank also made loan to debtor, as "James L. Anderson," taking and filing security agreement covering same automobile after checking with county clerk's office and determining that no prior liens on automobile had been filed against James L. Anderson, defendant bank's failure to file its lien in name shown on certificate of title was responsible for plaintiff bank's later determination, justified by lien records of county clerk, that there was no prior lien on record against automobile owned by James L. Anderson, and thus plaintiff bank's lien was entitled to priority over defendant bank's lien, although defendant bank was guilty of no intentional wrong and did all that was required by applicable provisions of UCC in taking and filing its security agreement. *Central Nat'l Bank & Trust Co. v. Community Bank & Trust Co.*, 528 P.2d 710 (1974).

In view of broad purposes of UCC, restrictive construction should not be given to provision which sets forth what constitutes "sufficient" financing statement. *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

Signed and filed financing statement afforded creditor no security interest in corn sold by debtor, where financing statement contained no language which could be interpreted as granting a security interest. *Kaiser Aluminum & Chem. Sales, Inc. v. Hurst*, 176 N.W.2d 166 (Iowa 1970).

Where a creditor's assistant treasurer intended to sign a financing statement but through inadvertence filed the statement without signing it, the typed words of the creditor's name were not an intended use of a symbol as a signature and the financing statement was not "signed" within the Code § 1-201(39) definition nor within the Code § 9-402(1) requirement even though

a search of the town clerk's records would have disclosed the unsigned financing statement and the name and address of the secured party as typed in the blank space, the "unsigned" statement did not "substantially comply" with the Code requirements under § 9-402(5). *Maine League Fed. Credit Union v. Atlantic Motors*, 250 A.2d 497 (Me. 1969).

Sufficiency of financing statement will not be decided on motion for judgment on pleadings. *West Publishing Co. v. Harrisburg Nat'l Bank & Trust Co.*, 48 Pa. D. & C.2d 53 (1969).

9. Description of collateral, generally.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description requirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Purpose of filing financing statement is notice to any third party; and requirement of description of collateral is satisfied if description reasonably informs third parties that certain identifiable item belonging to or in possession of debtor may be subject to prior security interest and that

further inquiry is necessary to determine if it is exact item being offered them as collateral. *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala. App. 523, 274 So. 2d 80 (Civ. App. 1973).

It is unnecessary to set forth the address where collateral is to be located, in the description of collateral, whenever it is obvious or readily inferable that the type of collateral covered would naturally be located in those places where the debtor does business. In *re Nickerson & Nickerson, Inc.*, 329 F. Supp. 93 (D. Neb. 1971), *aff'd*, 452 F.2d 56 (8th Cir. Neb. 1971).

A financing statement is sufficient if it indicates the types or describes the items of collateral. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

10. Description; particular applications.

In suit by debtor's receiver challenging bank's priority as perfected security interest holder and its concomitant right to take possession and dispose of secured collateral, UCC § 9-402 did not require bank to give notice to debtor's creditors that original security agreement was amended to increase amount of its loan and terms of repayment where increased loan was secured by same collateral originally described in financing statement. *Heights v. Citizens Nat'l Bank*, 463 Pa. 48, 342 A.2d 738 (1975).

In view of Code provisions in which only distinction between non-fixture and fixture financing statements was provision that in latter instance financing statement "must also contain description of real estate concerned," it must be concluded that legislature intended that real estate description be mandatory, and in its absence security interest in fixtures was not perfected so as to affect parties other than parties to transaction. *Home Sav. Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386 (Tex. Civ. App. 1972), *writ ref'd n.r.e.*, (Apr. 18, 1973).

11. —After-acquired property.

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not

satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commercially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Where security agreement was dated August 10 and financing statement describing collateral as "all accounts, contract rights and chattel paper now owned or hereafter acquired" was filed on August 11, second security agreement dated December 7, in which debtor agreed to delivery continuing guarantees from its principals in amount of \$150,000 rather than \$125,000 as provided in August 10 security agreement was perfected, and financing statement previously filed must be applied to it. *Richmond Crane Rigging &*

Drayage Co. v. Liberty Nat'l Bank, 27 Cal. App. 3d 968 (1st Dist. 1972).

Financing statement covering "all equipment, cash registers...used in operating of service stations at...900 block South Main, Sapulpa, Oklahoma" included after-acquired property at service station even though statement did not contain an after-acquired property clause. American Nat'l Bank & Trust Co. v. National Cash Register Co., 473 P.2d 234 (Okla. 1970).

Financing statement covering "motor vehicles" is sufficiently specific under Code § 9-402(1) to perfect security interest of bank loaning money on chattel mortgage for three named automobiles; adding words "after acquired", while advisable, is not necessary where debtor is retail auto agency obviously buying and selling autos. Bank of Utica v. Smith Richfield Springs, Inc., 58 Misc. 2d 113 (1968).

Where bank held a security interest in debtor's inventory and accounts receivable currently owned and thereafter to be acquired, the financing statement reasonably identified the collateral which was described as "inventory and accounts receivable," and the omission of the word "future" was immaterial. In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

The description in a financing statement that the collateral is "inventory" is sufficient to warn prospective creditors of the borrower that it may well include after-acquired property. Evans Prods. Co. v. Jorgensen, 245 Or. 362, 421 P.2d 978 (1966).

Where a finance company made a loan to a luncheonette owner who signed a security agreement conveying to the finance company as collateral the business together with all its good will, fixtures, equipment and merchandise, the agreement providing that the fixtures consisted of certain enumerated items "together with all property and articles now, and which may hereafter be, used or mixed with, added or attached to, and/or substituted for, any of the foregoing described property", and where the finance company filed a financing statement which set forth the specific items enumerated in the security agreement but made no reference to

after-acquired property, and where subsequent to the filing of the financing statement a cash register was delivered to the luncheonette owner under a conditional sales agreement but no financing statement covering the cash register was filed by the seller within ten days after delivery, it was held that under the system of notice filing adopted by the Code, as disclosed by subsection (1) of the instant section, the financing company's financing statement gave adequate notice of its security agreement with the after-acquired property clause contained therein, and that the financing statement covered the cash register as after-acquired property even though the cash register was not specifically referred to either in the security agreement or in the financing statement. NCR v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963).

12. —Accounts receivable.

"Accounts receivable" is adequate financing statement description of EOA contract within UCC § 9-402. Security Tire & Rubber Co. v. Hlass, 246 Ark. 1113, 441 S.W.2d 91 (1969).

Properly filed financing statements describing collateral as "accounts receivable" adequately described debtor's contracts and accounts for purpose of perfecting security interest therein. Walker Bank & Trust Co. v. Smith, 88 Nev. 502, 501 P.2d 639 (1972).

Description of collateral as "inventory and accounts receivable", without including descriptive word "future", is sufficient under Code § 9-402(1). In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

13. —Accuracy of description of single item of collateral.

Where security agreement and financing statement described collateral as watch and also identified watch by brand and model number, description of collateral was sufficient under UCC § 9-110; where security agreement described second item of collateral as, "ladies' bridal set white gold," but financing statement described collateral as, "one ladies' bracelet set-white gold," description of collateral in security agreement was sufficient to create security interest but description in financing statement did not reasonably

identify collateral and thus secured party did not have perfected security interest in bridal set. *DWG, Inc. v. Peltier*, 563 P.2d 152 (Okla. 1977).

Security agreement and financing statement adequately described collateral as required by UCC §§ 9-203, 9-402, and 9-110 where, although secured party had erroneously omitted first digit of identification number of automobile, omitted digit represented information previously described in words on each document. *City Bank & Trust Co. v. Warthen Serv. Co.*, 91 Nev. 293, 535 P.2d 162 (1975).

Financing statement did not sufficiently describe drilling rig so as to reasonably notify plaintiff of existence of prior lien, where it contained no reference to self-propelling equipment, but, according to custom of industry, described merely stationary piece of equipment with deisel engine to operate it. *Ray v. City Bank & Trust Co.*, 36 Ohio Misc. 83, 358 F. Supp. 630 (S.D. Ohio 1973).

Use of "COF" along with year and serial number was sufficient financing statement description of model of tractor known as "cab over tandum". *In re Richards*, 455 F.2d 281 (6th Cir. Mich. 1972).

Financing statement describing automobile by year, maker, and model was not fatally defective under Code § 9-402(1) because of one digit mistake in eleven digit serial number, since error was "not seriously misleading" within Code § 9-402(5). *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

The description of a caterpillar scraper by an incorrect serial number is sufficient in the absence of some physical description appearing of record in the security instrument which provides a key to the identity of the property. *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 134 S.E.2d 828 (1964).

14. —Crops.

Catfish raised by fish farmers did not qualify as "crop" for purpose of Section 75-9-203 and this section. *Sunburst Bank v. Findley*, 76 B.R. 547 (Bankr. N.D. Miss. 1987).

Where bank negligently failed to perfect its security interest in growing corn crop

by omitting description of real estate as required by UCC § 9-402, thereby causing said collateral to be subordinated to interest of third party, this constituted an unjustifiable impairment of such collateral and served to discharge accommodation party from liability to extent of such impairment of collateral under UCC § 3-306. *First Sec. Bank & Trust Co. v. Voelker* (In re Estate of Voelker), 252 N.W.2d 400 (Iowa 1977).

Description of collateral as crops and "proceeds" from crops was sufficient to include federal subsidy payments to which debtor became entitled. *In re Munger*, 495 F.2d 511 (9th Cir. Cal. 1974).

In action between competing secured creditors over proceeds from debtor's crops, UCC § 9-402 requirement that collateral be adequately described was met where subsequent lender had actual knowledge of prior claim of security interest in debtor's property and crops; under UCC § 9-204(4), providing that no security interest attaches under after-acquired property clause to crops which become such more than one year after security agreement is executed, subsequent lender had burden of proving that crops in question were not planted until more than one year after original security agreement was executed. *First Sec. Bank v. Wright*, 521 P.2d 563 (Utah 1974).

Secured party was not entitled to recover from purchasers of crops covered by security agreement, where financing statement merely referred to debtor's 1967 peanut crop, which was in several counties on many different properties, and was insufficient to identify security described; although financing statement need not contain formal metes and bounds or other legal description of real property on which crops subject to security interests are grown, it must contain some description of real estate by which exact crops constituting secured property can be reasonably identified and any description which reasonably identifies "real estate" is sufficient to meet "notice filing" theory of UCC. *First Nat'l Bank v. Calvin Pickle Co.*, 516 P.2d 265, 67 A.L.R.3d 302 (Okla. 1973).

Where financing statement and security agreement purportedly gave secured

party security interest in all of debtor's crops, but contained accurate legal description of certain farm lands belonging to debtor and omitted 3 other parcels of land on which debtor planted and harvested crops, crop description was insufficient to put third person on notice under UCC. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972).

Although §§ 9-402 and 9-110 were intended by legislature to require something less than legal description of land to apprise purchasers and creditors of security interest in growing crops, financing statement which described realty on which crops were raised as "land owned or leased by debtor in Cherokee County, Kansas" was insufficient to perfect security interest in such crops. *Chanute Prod. Credit Ass'n v. Weir Grain & Supply, Inc.*, 210 Kan. 181, 499 P.2d 517 (1972).

15. —General terms of description.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description requirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Description of collateral in financing statement as "all assets...regardless of type or description now owned...or to be bought (by debtor) in the future" did not satisfy requirements of UCC § 9-402(1), since such language was too general, vague, and misleading to fulfill the statute's requirement that financing statement must at least reveal the type of collateral in order to give subsequent secured parties adequate notice of creditor's security interest in the property that constitutes the collateral. *Mogul Enters., Inc.*

v. Commercial Credit Bus. Loans, Inc., 92 N.M. 215, 585 P.2d 1096 (1978).

Secured party's security interest in debtor's inventory was not perfected where description in financing statement required by UCC § 9-402(1) described collateral as "all accounts and contracts owned by the debtor or arising from the sale of inventory," since secured party could perfect security interest only in types of collateral listed on financing statement and under UCC § 9-105(1)(f), neither the term "accounts" nor the term "contracts" included inventory. *Gulf Nat'l Bank v. Franke*, 563 F.2d 766 (5th Cir. 1977).

Financing statement containing signatures of debtor and secured party, address of secured party, and containing description of collateral: "All Olivetti Corp. of America copying machines which have been delivered but not paid in full" met sufficiency test of description of collateral under UCC § 9-110 and formal requisites of financing statement under UCC § 9-402 and description reflected security interest under UCC § 1-201(37). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Tools are ordinarily defined as implements used by hand, and use of words "tilling and harvesting tools" in financing statement did not accurately describe power-driven farm machinery such as mower, reaper, fertilizer, so as to perfect security interests in those items. In *re Anselm*, 344 F. Supp. 544 (W.D. Ky. 1972).

A filed financing statement covering "motor vehicles" is sufficiently specific under UCC § 9-402 to perfect the security interest of a bank loaning on a chattel mortgage for three named automobiles as opposed to an interest of the seller of the automobiles to receive payment for those cars because of a worthless check. *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113 (1968).

16. —General terms of description; "consumer goods".

Reclamation petition filed by secured creditor of bankrupt was improperly denied where financing statement describing collateral as all consumer goods and personal property of all kinds and description located at debtor's address was ad-

equate under UCC § 9-402(1). In *re Turnage*, 493 F.2d 505 (5th Cir. Ala. 1974).

Use of term “consumer goods” is too broad, general, and meaningless to fulfill code mandate that financing statement indicates “types” of collateral; therefore, security interest of lender in tape deck, speaker, and 21-inch portable television was void. In *re Lehner*, 303 F. Supp. 317 (D. Colo. 1969), *aff’d*, 427 F.2d 357 (10th Cir. Colo. 1970).

17. —General terms of description; “equipment”.

Under UCC § 9-402(1) and UCC § 9-110, term “farm equipment” was sufficiently specific description of tractor to perfect security interest therein of federal Farmers Home Administration (FHA), since any reasonable third party who might consider accepting tractor as collateral would receive ample notice from secured party’s filed financing statement that further inquiry was in order. *United States v. Crittenden*, 563 F.2d 678 (5th Cir. Ga. 1977), *reh’g denied*, 568 F.2d 1368 (5th Cir. Ga. 1978), *vacated on other grounds*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), *on remand*, 600 F.2d 478 (5th Cir. Ga. 1979).

General description of collateral, which consisted of debtor’s farming equipment, in financing statement filed by bank as “all equipment now owned or hereafter acquired by debtor,” without indicating location of such equipment or its nature as farming equipment, was inadequate under UCC § 9-402(1) and § 9-110, and did not perfect bank’s lien in collateral, so as to render it superior to right to collateral of trustee in bankruptcy. In *re Werth*, 443 F. Supp. 738 (D. Kan. 1977).

Under UCC § 9-402(1), description in filed financing statement of equipment constituting collateral adequately described collateral where financing statement, although it did not refer to repairs, replacement parts, and accessions to collateral as did security agreement itself, did refer to “pallet-mill operation and manufacturing equipment.” *National Acceptance Co. of Am. v. Doede*, 78 F.R.D. 333 (W.D. Wis. 1978).

Unlike a financing statement which is designed merely to put creditors on notice that further inquiry is prudent, a security

agreement embodies the intentions of the parties and is the primary source to which a creditor’s or potential creditor’s inquiry is directed and must be reasonably specific; thus term “equipment” in omnibus clause of security agreement did not include automobiles owned by bankrupt corporation. In *re Laminated Veneers Co.*, 471 F.2d 1124 (2d Cir. N.Y. 1973).

Where on financing statement read “logging equipment and machinery used in logging operations” and another financing statement read “new and used equipment for logging and general construction”, descriptions were sufficient to describe property so as to create valid lien on log-loader in question. *Mountain Credit v. Michiana Lumber & Supply, Inc.*, 31 Colo. App. 112, 498 P.2d 967 (1972).

Description, “equipment of all kinds”, in financing statement was sufficiently informative as to constitute notice required by UCC § 9-402(1). *Maryland Nat’l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972).

Financing statement covering “all equipment, cash registers...used in operating of service stations at...900 block South Main, Sapulpa, Oklahoma” included after-acquired property at service station even though statement did not contain an after-acquired property clause. *American Nat’l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

18. —General terms of description; “personal property”.

Description in financing statement, “all personal property”, was not sufficient to perfect security interest against trustee in particular items of livestock and farm equipment set out in unrecorded security agreement. In *re Fuqua*, 330 F. Supp. 1050 (D. Kan. 1971), *aff’d*, 461 F.2d 1186 (10th Cir. Kan. 1972).

19. —Inventory.

In junior mortgagee’s action for damages for defendant’s alleged impairment of plaintiff’s security, where defendant under security agreement with dealer in modular homes had security interest in all of dealer’s present or future inventory and also first mortgage on 2.39 acres of land acquired by dealer for use as sales lot, on

which dealer installed two modular homes; where plaintiff held second mortgage on dealer's 2.39 acres as security for loan on which dealer defaulted; and where defendant after dealer's default quickly removed modular homes from dealer's lot pursuant to written authorization from officer of dealer's company, (1) homes placed by dealer on sales lot, although installed on concrete foundations and connected to utilities, were inventory and not real property or fixtures under UCC § 9-109 (4), since they were goods intended for immediate or ultimate sale; (2) defendant held perfected purchase-money security interest in dealer's inventory under UCC § 9-401(1)(c) and UCC § 9-402(1), which under UCC § 9-312(3) took priority over plaintiff's junior-mortgage interest; and (3) defendant on dealer's default had right to take possession of homes on dealer's lot, since they were inventory collateral. *Rakosi v. GECC*, 59 A.D.2d 553 (2d Dep't 1977).

In voidable preference challenge between secured party and debtor-car dealer's trustee in bankruptcy, financing statement covering "sales and service of new and used automobiles" sufficiently described collateral under UCC §§ 9-402(1) and 9-110; security interest in after-acquired property was valid under UCC § 9-204 and after-acquired property was adequately described where commer-

cially reasonable description of collateral contained within financing statement was equivalent to UCC § 9-109(4) definition of "inventory"; security interest in demonstrator models created pursuant to individual conditional sales agreements which debtor signed as both seller and buyer were valid under UCC §§ 9-303 and 9-306 and created purchase money security interest in favor of secured party which was subordinated to prior security interest in inventory collateral; dealer reserve account was integrated element of collateral securing inventory financing agreement and prior perfected security interest existed in that account which secured party could deem forfeited and duly transferred upon failure of security agreement's conditions. *Biggins v. Southwest Bank*, 490 F.2d 1304 (9th Cir. Cal. 1973).

Description of collateral as "inventory and accounts receivable", without including descriptive word "future", is sufficient under Code § 9-402(1). *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

The description in a financing statement that the collateral is "inventory" is sufficient to warn prospective creditors of the borrower that it may well include after-acquired property. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

§ 75-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

(a) A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in Section 75-9-311(a), using the terms "consignor," "consignee," "lessor," "lessee," "bailor," "bailee," "licensor," "licensee," "owner," "registered owner," "buyer," "seller," or words of similar import, instead of the terms "secured party" and "debtor."

(b) This part applies to the filing of a financing statement under subsection (a) and, as appropriate, to compliance that is equivalent to filing a financing statement under Section 75-9-311(b), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor,

owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

SOURCES: Former 1972 Code § 75-9-505 [Codes, 1942, § 41A:9-505; Laws, 1966, ch. 316, § 9-505; Laws, 1977, ch. 452, § 35, eff from and after April 1, 1978] is now found in comparable provisions enacted at §§ 75-9-620, 75-9-621, and 75-9-624 by Laws, 2001, ch. 495, § 1. Present § 75-9-505 was derived from former 1972 Code § 75-9-408 [Laws, 1977, ch. 452, § 31, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-506. Effect of errors or omissions.

(a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 75-9-503(a) is seriously misleading.

(c) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 75-9-503(a), the name provided does not make the financing statement seriously misleading.

(d) For purposes of Section 75-9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

SOURCES: Former 1972 Code § 75-9-506 [Codes, 1942, § 41A:9-506; Laws, 1966, ch. 316, § 9-506, eff March 31, 1968] is now found in comparable provisions enacted at §§ 75-9-623 and 75-9-624 by Laws, 2001, ch. 495, § 1. Present § 75-9-506 was derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(8).

6. Misspelling of debtor's name.
7. Misstatement of debtor's corporate or trade name.
8. Use of debtor's trade name only.
9. Misidentification of secured party.
10. Failure to identify owner of collateral.
11. Effect of debtor's change of name or corporate structure.
12. Minor errors.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(8).

6. Misspelling of debtor's name.

Misspelling of corporate debtor's name—"Ranelli" instead of "Ranalli"—on filed financing statement was seriously misleading and amounted to no filing at all, so that security interest was ineffective as to person in possession. *John Deere Co. v. William C. Pahl Constr. Co.*, 59 Misc. 2d 872 (1969), *aff'd*, 34 A.D.2d 85, 310 N.Y.S.2d 945 (4 Dep't 1970).

A financing statement is insufficient when it spells the name of the debtor as Kaplan when in fact it is Kaplas. *Bank of N. Am. v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (L. Div. 1967).

Under the provisions of subsection (5) of the instant section, a financing statement which substantially complies with the requirements of the section is sufficient even though it contains minor errors which are not seriously misleading. Thus, where the debtor was described as "Carroll, Edmund d/b/a Cozy Kitchen 574 Wash St Canton, Mass" and the word "Cozy" should have been "Kozy", it was held that the name of the debtor was accurately stated and the error in the name under which he did business was a minor error which was not seriously misleading. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

7. Misstatement of debtor's corporate or trade name.

Financing statement which fails to list the debtor's corporate name, and which gives only debtor's trade name, may nevertheless be sufficient if trade name is sufficiently similar to corporate name that it is not seriously misleading. *Sencore, Inc. v. Pongetti* (In re Columbus Typewriter Co.), 75 B.R. 834 (Bankr. N.D. Miss. 1987).

Identification of debtor, "Southern Supply Company of Greenville, N.C., Inc.," in financing statements as "Southern Supply Co." was not "seriously misleading" within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *In re Southern Supply Co.*, 405 F. Supp. 20 (E.D.N.C. 1975).

Financing statement describing debtor as "Nara Dist. Inc." when in fact correct name of debtor was "Nara Non Food Distributing Inc." was sufficient as putting any interested person fairly on notice that there might be an outstanding lien against the Nara intended. *In re Nara Non Food Distrib. Inc.*, 66 Misc. 2d 779 (1970), aff'd, 36 A.D.2d 796, 320 N.Y.S.2d 1014 (2d Dep't 1971).

Erroneous financing statement identification of secured party as "O. M. Scott Sons Co.", where even most basic inquiry to former would disclose that it was

wholly owned subsidiary of latter, and would lead to full disclosure of exact state of affairs regarding asserted security interest. *In re Colorado Mercantile Co.*, 299 F. Supp. 55 (D. Colo. 1969).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. *In re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. Conn. 1965).

8. Use of debtor's trade name only.

Secured party's financing statements were sufficient under UCC § 9-402 to perfect security interest in debtor's equipment, notwithstanding filing officer filed and indexed financing statements only under trade name of debtor, Kaw Lake Cement, and not under his true name, Joseph Arthur Fowler, where each financing statement named three debtors, Kaw Lake Cement, Jerry A. Fowler and J. A. Fowler. *McMillin v. First Nat'l Bank & Trust Co.*, 407 F. Supp. 799 (W.D. Okla. 1975).

Financing statement which did not contain name of bankrupt debtor, but instead contained name of business that debtor was engaged in, was not in substantial compliance with Code. *In re Thomas*, 310 F. Supp. 338 (N.D. Cal. 1970), aff'd, 466 F.2d 51 (9th Cir. Cal. 1972).

9. Misidentification of secured party.

Although the Uniform Commercial Code clearly contemplates and sanctions "floating collateral" (after-acquired property of debtor) and "floating debt" (future advances), it does not contemplate "floating secured parties"-that is, an open-ended class of creditors with unsecured and unperfected interests who, after the debtor's bankruptcy, can assign their claims to a more senior lienor and magically secure and perfect their interests under an omnibus security agreement and financing statement. To allow "floating secured parties" would clearly be at odds with the "simple notice" requirements of UCC § 9-402 and would undercut perfection requirement of Article 9, which reflects UCC policy against secret security.

Republic Nat'l Bank v. Fitzgerald, 565 F.2d 366 (5th Cir. Tex. 1978).

Financing statement which identified the debtor, an individual named Henry Platt, as Platt Fur Co., an unregistered fictitious name for debtor's business, was not "seriously misleading" and did not prejudice the perfection of the creditor's claim. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

10. Failure to identify owner of collateral.

In action to recover possession of motor home that plaintiff secured party had sold to debtor under retail installment contract and security agreement, where (1) plaintiff, although authorized to file financing statement, did not do so before assigning installment contract and security agreement to bank, (2) after contract and security agreement had been assigned to bank, debtor transferred title to home to third-party purchaser, (3) such purchaser resold home to another third party who, in turn, resold it to defendant, (4) after first third-party purchaser had purchased home, bank filed financing statement that listed only original buyer of home as "debtor," and (5) on original buyer's default in making payments, bank reassigned installment contract and security agreement to plaintiff, which sought to replevy home from last third-party purchaser, court held (1) that even though bank was aware that title to home had been transferred to first third-party purchaser, bank nevertheless, on filing its financing statement, listed only original buyer as "debtor" on such statement, (2) that financing statement, as a result, failed under UCC §§ 9-402(1) and 9-105(1)(d) to identify "debtor" properly in situation where owner of collateral and obligor on financing agreement were not the same person, (3) that plaintiff's security interest was therefore not perfected, and (4) that since defendant third-party purchaser had purchased home out of ordinary course of business and without knowledge of plaintiff's unperfected security interest therein, defendant's ownership of home was free of such security interest under UCC § 9-301(1)(c). *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Under UCC § 9-402(1), a financing statement must include the name and address of the debtor. In this connection, however, the term "debtor" is defined by UCC § 9-105(1)(d) to include both the owner of the collateral and the obligor on the financing agreement if the owner and the obligor are not the same person. *White Star Distribs., Inc. v. Kennedy*, 66 A.D.2d 1011 (4th Dep't 1978).

Use of nominee was legitimate under Uniform Commercial Code; thus, recording of financing statement was entirely proper despite fact that principal creditor's nominee, rather than principal creditor, was named as secured party. *In re Cushman Bakery*, 526 F.2d 23 (1st Cir. Me. 1975), cert. denied, 425 U.S. 937, 96 S. Ct. 1670, 48 L. Ed. 2d 178 (1976).

Although owner of property permitted debtor to use it as collateral for loan from secured party and valid security interest attached in favor of secured party under security agreement given by debtor, secured party failed to properly perfect its interest in that financing statement it filed did not contain any reference to owner of collateral; in view of provision of UCC § 9-105(1)(d), that term "debtor" may include both owner of collateral and obligor if context so requires, UCC § 9-402, subdivisions (1) and (3), requiring that financing statement contain "debtor's" name, must be construed as referring to both actual debtor and owner of collateral, thus requiring both names on financing statement to perfect security interest. *K.N.C. Whsle., Inc. v. AWMCO, Inc.*, 56 Cal. App. 3d 315, 99 A.L.R.3d 473 (1st Dist. 1976).

11. Effect of debtor's change of name or corporate structure.

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated

automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Secured party apparently has duty under second sentence of UCC § 9-402(7) to monitor identity of debtor. Thus, secured party must take steps to insure that it will become aware of any changes of name, identity, or corporate structure of its

debtor within four months after such change or else risk losing its perfected security interest in collateral acquired after that time, should the financing statement be found to be seriously misleading at time of the change. *In re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Where (1) debtors, after secured party had perfected security interest in debtors' business fixtures, equipment, merchandise, inventory, and after-acquired property, transferred such collateral to corporation formed by debtors to operate business under new name, (2) corporation two and a half years later became bankrupt, (3) at time of such bankruptcy, merchandise and inventory of the business was not the same as that owned by original debtors when security interest was acquired by secured party, and (4) bankruptcy trustee claimed that under UCC § 9-402(7), secured party had only unsecured claim to proceeds from sale of corporation's inventory and merchandise acquired after four-month period following transfer of original inventory and merchandise to corporation, since such transfer involved change in the business' ownership and name that was seriously misleading, court held (1) that secured party did not have to file new financing statement within four months following such transfer in order to retain its perfected security interest in the after-acquired property, (2) that transfer situation was governed by third sentence of UCC § 9-402(7), and (3) that if any creditors had checked the corporation's source of title, they could easily have discovered the corporation's assumption of notes which were in the original debtors' individual names and, by running a check on those names, have found the secured party's filed financing statement. *In re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Under UCC § 9-402, creditor, as holder of prior secured interest against debtor, did not have affirmative duty to amend or refile financing statement to reflect name change of debtor from "South Haven Fruit Exchange" to "Blossom Trail Growers, Inc." in order to preserve its superior in-

terest over subsequent creditor which had perfected its security interest against "Blossom Trail Growers, Inc." *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where financing statement was properly filed and debtor subsequently changed its corporate name, secured party was not under obligation to refile its financing statement to reflect such change of name notwithstanding secured party had knowledge of the change. *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 57 Mich. App. 1, 225 N.W.2d 209 (1974), *aff'd*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where secured party had perfected purchase money security interest in television equipment which it sold to debtor, subsequent transfer of all assets and liabilities of debtor corporation to newly formed corporation having same shareholders, officers and directors as debtor did not constitute "sale, exchange, or other disposition" of secured property within meaning of UCC § 9-306(2); thus, financing statement which was properly filed continued to be effective after transfer of assets and liabilities, although no amendment to financing statement was made to reflect change in name of debtors, where name change was minor and not seriously misleading, and financing statement was accurate in every other detail. *In re Kittyhawk Tel. Corp.*, 75 Ohio Op. 2d 469, 516 F.2d 24 (6th Cir. Ohio 1975).

Where secured party entered into security agreement with partnership engaged in appliance business, covering "all present inventory belonging to the Dealer as well as any and all subsequently acquired inventory," where partnership assets were subsequently transferred to newly formed corporation, and where new financing statement was filed under name of partnership but was not filed with reference to corporation as debtor, security agreement containing after-acquired property clause was effective against newly-formed corporation and secured party's security interest extended to inventory subsequently acquired by corporation; fact that financing statement was

filed under partnership name, "Clint's Appliance Sales and Service," rather than corporate name, "Clint's Appliance Sales and Service, Inc.," would not cause secured party's security interest to be unprotected against either corporation or trustee in bankruptcy; but, even if it could be said that financing statement was in some way misleading, under UCC § 9-402(7) (1972 Official Text) secured party's security interest remained perfected under its financing statement with partnership at least four months after partnership changed its "name, identity or corporate structure." *Fliegel v. Associates Capital Co.*, 272 Or. 434, 537 P.2d 1144 (1975).

Secured creditor who had knowledge at time of execution of security agreement that debtor contemplated at future time changing its name to particular new name, but who nevertheless proceeded to extend credit knowing that original filing of financing statement would not reflect change and would therefore mislead and deceive potential creditors and purchasers, forfeited his protected interest when change of name occurred. *In re Kalamazoo Steel Process, Inc.*, 503 F.2d 1218 (6th Cir. Mich. 1974).

In action between secured party and trustee in bankruptcy over rights to forestry equipment in possession of secured party, financing statement signed by corporation, whose separate existence had already ended by merger at time of signing, was sufficient to perfect security interest of corporation into which it was merged under UCC § 9-402 since statement was sufficient to put potential creditors on notice of prior security interest. *In re Wilco Forest Mach., Inc.*, 491 F.2d 1041 (5th Cir. Ala. 1974).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. *In re Pasco Sales Co.*, 77 Misc. 2d 724 (1974).

12. Minor errors.

UCC § 9-402 adopts a system of notice filing that is designed to replace rigid description requirements. Specifically, UCC § 9-402(5) provides that a financing statement that substantially complies with the requirements of UCC § 9-402 is effective, even though it contains minor errors that are not seriously misleading. However, although the description requirements have been made more liberal by subsection (5) of the statute, subsection (1) clearly requires some specificity of description. Thus, the financing statement must either indicate the type of collateral given or describe the particular item of which it consists. *Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc.*, 92 N.M. 215, 585 P.2d 1096 (1978).

Holder of security interest in form of chattel mortgage on herd of cattle took priority over holder of judgment lien who attempted to levy execution on cattle, although financing statement filed by secured party omitted signature and also omitted addresses of both secured party and debtor: (1) lack of secured party's signature from financing statement was minor error and financing statement with that omission, nevertheless, was in substantial compliance with UCC § 9-402(1); and (2) absence of addresses of both debtor and secured party did not render financing statement ineffectual where all parties involved were residents of same small town, holder of judgment lien knew both debtor and secured party and where each of them lived, and there was no showing of prejudice to holder of judgment lien. *Riley v. Miller*, 549 S.W.2d 314, 100 A.L.R.3d 385 (Ky. Ct. App. 1977).

Filing requirements of Georgia Uniform Commercial Code are analogous to requirements for certificate-of-title applications under Georgia Motor Vehicle Certificate of Title Act, since both laws require filing of security interests to give notice to both future creditors of debtor and to potential buyers of collateral involved. *Roberts v. International Harvester Credit Corp.*, 143 Ga. App. 206, 237 S.E.2d 697 (1977).

Filing of financing statement under assumed trade name was effective unless it

was misleading to creditors. *Siljeg v. National Bank of Commerce*, 509 F.2d 1009 (9th Cir. Wash. 1975).

Identification of debtor, "Southern Supply Company of Greenville, N.C., Inc.," in financing statements as "Southern Supply Co." was not "seriously misleading" within meaning of UCC § 9-402(5), since identification was sufficient to put interested persons on notice of outstanding security interest. *Matter of Southern Supply Co. of Greenville, North Carolina, Inc.*, 1975, 405 F. Supp. 20

Failure of finance company to check box opposite provision that debtor had signed security agreement authorizing finance company to file statement was minor error which could not seriously mislead one who searched file; held, financing statement was effective. *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc.*, 32 A.D.2d 643 (2d Dep't 1969).

Individual's signature on financing statement, without any indication that he had signed as representative of debtor corporation was "not seriously misleading" within Code § 9-402(5), where financing statement was filed solely under corporate name; where corporation had as part of its name surname of signor; and where no prior financing statements executed by signor or changes in corporate organization might mislead third parties. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

Where the names of the mortgagors and mortgagees and their respective addresses were typed in the appropriate boxes appearing in the form of financing statement, and the statement is signed by the mortgagors at the bottom of the form, the absence of the mortgagee's signature constituted only a minor error which was not seriously misleading. *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. Conn. 1965).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. *In re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. Conn. 1965).

Under the provisions of subsection (5) of the instant section, a financing statement which substantially complies with the requirements of the section is sufficient even though it contains minor errors which are not seriously misleading. Thus, where the debtor was described as “Carroll, Edmund d/b/a Cozy Kitchen 574 Wash St Canton, Mass” and the word “Cozy” should have been “Kozy”, it was held that the name of the debtor was accurately stated and the error in the name under which he did business was a minor error which was not seriously misleading. *NCR v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963).

In *Sales Finance Corp. v. McDermott Appliance Co.* (1960) 340 Mass 493, 165 NE2d 119, it was said that the decision of the court that a minor variation in the name of the trustee in a statement of trust receipt financing filed under the former Uniform Trust Receipts Act did not render the statement ineffective was consonant with the provision of subsection (5) of the instant section that a financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. *Sales Fin. Corp. v. McDermott Appliance Co.*, 340 Mass. 493, 165 N.E.2d 119 (1960).

§ 75-9-507. Effect of certain events on effectiveness of financing statement.

(a) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Except as otherwise provided in subsection (c) and Section 75-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under Section 75-9-506.

(c) If a debtor so changes its name that a filed financing statement becomes seriously misleading under Section 75-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four (4) months after, the change; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four (4) months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four (4) months after the change.

SOURCES: Former 1972 Code § 75-9-507 [Codes, 1942, § 41A:9-507; Laws, 1966, ch. 316, § 9-507, eff March 31, 1968] is now found in comparable provisions enacted at §§ 75-9-625 and 75-9-627 by Laws, 2001, ch. 495, § 1. Present § 75-9-507 was derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and was enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(7).

6. Effect of debtor's change of name or corporate structure.
7. Security agreement as financing statement.
8. Relationship between financing statement and security agreement.
9. Effect of refinancing.
10. Amendment or continuation of security agreement.
11. Assignment of security interest of priority.
12. Transfer of collateral by debtor.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(7).

6. Effect of debtor's change of name or corporate structure.

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC

§ 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Secured party apparently has duty under second sentence of UCC § 9-402(7) to monitor identity of debtor. Thus, secured party must take steps to insure that it will become aware of any changes of name, identity, or corporate structure of its debtor within four months after such change or else risk losing its perfected security interest in collateral acquired after that time, should the financing statement be found to be seriously misleading at time of the change. In *re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Where (1) debtors, after secured party had perfected security interest in debtors' business fixtures, equipment, merchandise, inventory, and after-acquired property, transferred such collateral to corporation formed by debtors to operate business under new name, (2) corporation

two and a half years later became bankrupt, (3) at time of such bankruptcy, merchandise and inventory of the business was not the same as that owned by original debtors when security interest was acquired by secured party, and (4) bankruptcy trustee claimed that under UCC § 9-402(7), secured party had only unsecured claim to proceeds from sale of corporation's inventory and merchandise acquired after four-month period following transfer of original inventory and merchandise to corporation, since such transfer involved change in the business' ownership and name that was seriously misleading, court held (1) that secured party did not have to file new financing statement within four months following such transfer in order to retain its perfected security interest in the after-acquired property, (2) that transfer situation was governed by third sentence of UCC § 9-402(7), and (3) that if any creditors had checked the corporation's source of title, they could easily have discovered the corporation's assumption of notes which were in the original debtors' individual names and, by running a check on those names, have found the secured party's filed financing statement. *In re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Under UCC § 9-402, creditor, as holder of prior secured interest against debtor, did not have affirmative duty to amend or refile financing statement to reflect name change of debtor from "South Haven Fruit Exchange" to "Blossom Trail Growers, Inc." in order to preserve its superior interest over subsequent creditor which had perfected its security interest against "Blossom Trail Growers, Inc." *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where financing statement was properly filed and debtor subsequently changed its corporate name, secured party was not under obligation to refile its financing statement to reflect such change of name notwithstanding secured party had knowledge of the change. *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 57 Mich. App. 1, 225 N.W.2d 209 (1974), *aff'd*, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

Where secured party entered into security agreement with partnership engaged in appliance business, covering "all present inventory belonging to the Dealer as well as any and all subsequently acquired inventory," where partnership assets were subsequently transferred to newly formed corporation, and where new financing statement was filed under name of partnership but was not filed with reference to corporation as debtor, security agreement containing after-acquired property clause was effective against newly-formed corporation and secured party's security interest extended to inventory subsequently acquired by corporation; fact that financing statement was filed under partnership name, "Clint's Appliance Sales and Service," rather than corporate name, "Clint's Appliance Sales and Service, Inc.," would not cause secured party's security interest to be unprotected against either corporation or trustee in bankruptcy; but, even if it could be said that financing statement was in some way misleading, under UCC § 9-402(7) (1972 Official Text) secured party's security interest remained perfected under its financing statement with partnership at least four months after partnership changed its "name, identity or corporate structure." *Fliegel v. Associates Capital Co.*, 272 Or. 434, 537 P.2d 1144 (1975).

Where secured party had perfected purchase money security interest in television equipment which it sold to debtor, subsequent transfer of all assets and liabilities of debtor corporation to newly formed corporation having same shareholders, officers and directors as debtor did not constitute "sale, exchange, or other disposition" of secured property within meaning of UCC § 9-306(2); thus, financing statement which was properly filed continued to be effective after transfer of assets and liabilities, although no amendment to financing statement was made to reflect change in name of debtors, where name change was minor and not seriously misleading, and financing statement was accurate in every other detail. *In re Kittyhawk Tel. Corp.*, 75 Ohio Op. 2d 469, 516 F.2d 24 (6th Cir. Ohio 1975).

In dispute between assignee for benefit of creditors and bank claiming security

interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. *In re Pasco Sales Co.*, 77 Misc. 2d 724 (1974).

Secured creditor who had knowledge at time of execution of security agreement that debtor contemplated at future time changing its name to particular new name, but who nevertheless proceeded to extend credit knowing that original filing of financing statement would not reflect change and would therefore mislead and deceive potential creditors and purchasers, forfeited his protected interest when change of name occurred. *In re Kalamazoo Steel Process, Inc.*, 503 F.2d 1218 (6th Cir. Mich. 1974).

In action between secured party and trustee in bankruptcy over rights to forestry equipment in possession of secured party, financing statement signed by corporation, whose separate existence had already ended by merger at time of signing, was sufficient to perfect security interest of corporation into which it was merged under UCC § 9-402 since statement was sufficient to put potential creditors on notice of prior security interest. *In re Wilco Forest Mach., Inc.*, 491 F.2d 1041 (5th Cir. Ala. 1974).

7. Security agreement as financing statement.

Although it is evident under UCC § 9-402 that one instrument may qualify as both security agreement and financing statement, from which it follows that financing statement may also constitute security agreement if it otherwise qualifies as such, where parties executed only promissory note in standard form and short form financing statements and where neither financing statements nor note manifested intent to create or provide for security interest, there was no security agreement as required by UCC § 9-203 and thus creditor did not acquire security interest. *Crete State Bank v. Lauhoff Grain Co.*, 195 Neb. 605, 239 N.W.2d 789 (1976).

Chattel mortgage may serve both as "security agreement" and "financing statement" under Nebraska UCC, provided it complies with requirements for said instruments, and contains necessary information, as set out in UCC; under UCC § 9-402, there are 2 formal requisites of "financing statement", i.e., (1) signatures and addresses of both parties, and (2) description of collateral by type or item, and financing statement substantially complying with these requirements is effective even though it contains minor errors which are not seriously misleading; address of secured party to be set out in financing statement under UCC § 9-402 must be such address as to enable one interested in searching records to contact party in question for purpose of obtaining information concerning security interest, i.e., address must be sufficiently complete to enable prudent person using reasonable care to locate secured party, and question of sufficiency of address of secured creditor is question of fact; thus, where chattel mortgage filed as financing statement gave address of secured party as "Omaha, Nebraska," and there was nothing in record from which court could determine whether secured creditor was or was not listed in Omaha city directory or in Omaha telephone book, or whether any of interested parties had knowledge of address of secured creditor, or any other information which would have facilitated contacting secured creditor, address was insufficient to comply with requirements of UCC § 9-402. *Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co.*, 191 Neb. 74, 214 N.W.2d 18 (1974).

Notice of sale agreement filed as financing statement satisfied Code § 9-402(1) requirement even though not indicating that there was underlying security interest involved. *Rooney v. Mason*, 394 F.2d 250 (10th Cir. Wyo. 1968).

Lack of secured party's signature on chattel mortgage filed as financing statement does not make statement defective under Code § 9-402(1). *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

An instrument denominated as a "chattel mortgage" may be filed as a financing statement so long as it contains the nec-

essary information. *Strevell-Paterson Fin. Co. v. May*, 77 N.M. 331, 422 P.2d 366 (1967).

A conditional sales contract in proper form and timely filed with correct recording office has been filed in compliance with this section even though recorder erroneously returned instrument for an acknowledgment. *In re Mutual Bd. & Packaging Corp.*, 342 F.2d 294 (2d Cir. N.Y. 1965).

A chattel mortgage on bowling alley equipment, although unsigned by the debtor as is required by this section, was held valid as a financing statement when filed, and the court commented upon the detailed nature of the information contained in the instrument and observing that § 1-102 requires a liberal interpretation of the Commercial Code added that a period of indulgence should be granted in connection with cases raising under the code. *Alloway v. Stuart*, 385 S.W.2d 41 (Ky. 1964).

8. Relationship between financing statement and security agreement.

In action by one secured party to replevy common debtor's inventory collateral from defendant second secured party, where (1) defendant's security agreement was executed on June 9, 1975, and defendant thereunder immediately took possession of debtor's inventory collateral, which consisted of automobile parts and accessories, (2) plaintiff previously, on December 15, 1972, had filed financing statement, in which it listed itself as creditor and same person as debtor, which provided that such statement covered debtor's inventory of automobile parts and accessories, (3) plaintiff thereafter executed security agreement with debtor on December 28, 1972 which granted plaintiff continuing security interest in such inventory to secure (a) capital loan note, (b) certain other existing liabilities, including a wholesale account of indebtedness, and (c) all future advances, (4) debtor was constantly indebted to plaintiff from December, 1972, even though debtor fully repaid capital loan note on May 14, 1975, and (5) defendant claimed that since capital loan note (that is, the original indebtedness) had been fully repaid before date on which

defendant's security interest attached, plaintiff had ceased to have security interest in debtor's inventory, court held (1) that since UCC § 9-204(3) clearly provides that obligations covered by a security agreement may include future advances, plaintiff's security agreement, because it covered future advances, was still effective, (2) that plaintiff was not required by UCC § 9-402(1) to file second financing statement to give notice of debtor's wholesale account of indebtedness, since UCC § 9-402(1) merely states that financing statement may be filed before security agreement is made or security interest otherwise attaches, which is what had occurred in the present case, and (3) that under UCC § 9-312(5)(a), because plaintiff had filed its financing statement before filing of defendant's financing statement, plaintiff's lien on debtor's collateral was superior to that of defendant. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

That the financing statement may be filed prior to the making of a security agreement, and that a security interest need not be in existence at the time the financing statement is filed, is clearly contemplated under the provisions of this section. *In re United Thrift Stores, Inc.*, 242 F. Supp. 714 (D.N.J. 1965), *aff'd*, 363 F.2d 11 (3d Cir. N.J. 1966).

9. Effect of refinancing.

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community*

Banking Co., 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Where financing statement covering first loan to debtor was filed and four subsequent refinancing loans were made with no new filing, each subsequent loan being secured by chattel mortgages on same property that served as collateral for first loan, security interests covering subsequent loans were perfected, even though financing statement was on file before security interests in subsequent loans attached; fundamental and reiterated policy of code is that sequence of steps necessary for perfection is immaterial. In re Rivet, 299 F. Supp. 374 (E.D. Mich. 1969).

There is no requirement that when a loan is refinanced that a new financing statement must be filed and the former statement cancelled for the reason that the filing statement is not a lien which is discharged by refinancing but is merely a notice that there is some security interest in the designated collateral. Hence the original statement stands and continues the priority of the security interest for the benefit of the refinanced obligation. HFC v. Bank Comm'r, 248 Md. 233, 235 A.2d 732 (1967).

10. Amendment or continuation of security agreement.

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. Chrysler Credit Corp. v. Community Banking Co., 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Security agreement entered into in February, 1974, which created valid security interest as between debtor and bank with

respect to debtor's accounts receivable, was perfected by existence of record of financing statement, first filed in 1959 and kept current by timely filed continuation statements, filed at regular intervals (in each case just short of five years), showing debtor's accounts receivable as collateral, notwithstanding there were intervals when debtor owed bank nothing, during which time no security interest existed, and that from 1972 to February, 1974, parties did not intend bank's loans to be secured; duly filed financing statement, showing same debtor, same secured party, and same collateral, serves to perfect security interest created in transaction other than that for which financing statement was originally filed. In re Gilchrist Co., 403 F. Supp. 197 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1246 (3d Cir. Pa. 1976).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. In re Pasco Sales Co., 77 Misc. 2d 724 (1974).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with

respect to “owned” land, although secured party’s security interest was not perfected by filing as of time of levy under attaching creditor’s purported attachment, evidence showed that attaching creditor either had actual notice of secured party’s interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party’s interest, and, thus, secured party’s unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat’l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

A careful reading of UCC § 9-402(4) does not compel a finding that the financing statement must be amended when the security agreement is altered. *James Talcott, Inc. v. Franklin Nat’l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

It was not necessary for agreement to provide for extension or renewal of indebtedness in order that creditor have valid security interest in property covered by security agreement where maker had executed and delivered security agreement to payee containing no provision for renewal or extension of note, financing statement containing no maturity date was filed, maker made payment on original note and executed and delivered to payee renewal note which recited date of original loan and also referred to collateral for original loan, and maker failed to pay note when it became due. *In re Cantrill Constr. Co.*, 418 F.2d 705 (6th Cir. Ky. 1969), cert. denied, 397 U.S. 990, 90 S. Ct. 1124, 25 L. Ed. 2d 398 (1970).

11. Assignment of security interest of priority.

In receivership proceedings involving conflicting petitions to reclaim assets of insolvent corporation, secured party which had loaned money to insolvent and had performed every act required by law to obtain perfected security interest in all of insolvent’s receivables, including filing of financing statement pursuant to UCC §§ 9-302(1), 9-304(1), and 9-402(1), had priority over all unsecured general creditors, including investors in the insolvent corporation who held debentures and notes which stated on their face that they were subordinate to claims of all other contract creditors. *Coastal Fin. Corp. v.*

Coastal Fin. Corp., 120 R.I. 317, 387 A.2d 1373 (1978).

Plaintiff’s security interest in all present and future Medicaid and Medicare accounts receivable of ambulance company, which plaintiff perfected on May 11, 1972 by filing financing statement in accordance with UCC § 9-402, had priority over state tax warrant for sum owed by ambulance company for employee income-withholding taxes, which warrant was filed on October 8, 1975 and under which state tax department had levied on Medicaid payments owed to ambulance company by county department of social services. In such case, priority of plaintiff’s security-interest lien was not affected by state statute providing that assignment of claim of supplier of medical assistance was invalid as against any social services district since such statute, although prohibiting enforcement of plaintiff’s assignment against any social services district, did not prohibit enforcement of such assignment as against any other person. *IMFC Professional Servs., Inc. v. State*, 59 A.D.2d 1047 (4th Dep’t 1977).

Where 1966 loan was secured by assignment of contract right, where financing statement filed in 1966 was in compliance with UCC § 9-402(1) and where secured party made subsequent loans to debtor in 1967 and 1968, even if 1966 and 1967 notes did not contain future advance clauses, secured party maintained position of perfected secured creditor with respect to 1968 loan which was also secured by assignment of contract rights covered by 1966 note and financing statement. *In re Estate of Gruder*, 89 Misc. 2d 477 (1977).

Where automobile dealer sold automobile under retail instalment contract and assigned contract to bank with unconditional guarantee of payment, automobile dealer was subrogated to rights of bank in collateral, and where UCC § 9-402 required filing of financing statement in order to perfect security interest in such collateral, and where both parties failed to file such financing statement, dealer was entitled to be discharged to extent of any loss sustained by reason of bank’s failure to file statement. *First Nat’l Bank v. Haugen Ford, Inc.*, 219 N.W.2d 847 (N.D. 1974).

12. Transfer of collateral by debtor.

Where (1) bank advanced loan guaranteed by Federal Small Business Administration, to owner of business, (2) bank secured loan by perfected security interest in all of debtor's furniture, fixtures, machinery, and equipment, (3) bank filed financing statement which listed debtor's corporation as debtor, and (4) such corporation, without knowledge or consent of bank or SBA as secured creditors, sold collateral subject to creditors' security interest to second corporation which became bankrupt and had its assets sold at public auction, court held (1) that bankruptcy judge committed error in ruling that although bank and SBA did not impliedly or expressly consent to transfer of collateral to second corporation, failure of bank and SBA to file financing statement naming second corporation as debtor rendered bank's and SBA's previously perfected security interest ineffective against second corporation, and (2) that under Cal UCC § 9-306(2), stating that security interest continues in collateral notwithstanding its sale by debtor unless disposition was authorized by secured party, and Cal UCC § 9-402(6), providing that filed financing statement remains effective with respect to collateral transferred by debtor, even though secured party knows of or consents

to such transfer, security interest of bank and SBA clearly survived subsequent transfer of collateral to second corporation. *United States v. Ocean Elecs. Corp.*, 451 F. Supp. 511 (S.D. Cal. 1978).

"Collateral" as used in third and final sentence of UCC § 9-402(7) is not limited as it is in the second sentence, where it is defined as that collateral acquired by debtor more than four months after change in debtor's name. Instead, the final sentence speaks of collateral transferred by the debtor, which must mean the property subject to the security interest. The final sentence is clear that the filed statement remains effective with respect to collateral transferred by debtor, regardless of knowledge or consent of secured party. This also means collateral which consists of after-acquired property. In *re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665 (S.D. Ill. 1977).

Where vendee of automobile, who was debtor of secured party who had failed to file financing statement under Code § 9-402, resold automobile to vendor, such subsequent sale vested title to automobile in vendor, superior to any claim of third party. *Dunford v. Columbus Auto Auction, Inc.*, 114 Ga. App. 407, 151 S.E.2d 464 (1966).

§ 75-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.

(a) Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) to be seriously misleading under Section 75-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four (4) months after, the new debtor becomes bound under Section 75-9-203(d); and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four (4) months after the new debtor becomes bound under Section 75-9-203(d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under Section 75-9-507(a).

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

§ 75-9-509. Persons entitled to file a record.

(a) A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) The debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c); or

(2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) The collateral described in the security agreement; and

(2) Property that becomes collateral under Section 75-9-315(a)(2), whether or not the security agreement expressly covers proceeds.

(c) By acquiring collateral in which a security interest or agricultural lien continues under Section 75-9-315(a)(1), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under Section 75-9-315(a)(2).

(d) A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) The secured party of record authorizes the filing; or

(2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by Section 75-9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) If there is more than one (1) secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d).

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-510. Effectiveness of filed record.

(a) A filed record is effective only to the extent that it was filed by a person that may file it under Section 75-9-509.

(b) A record authorized by one (1) secured party of record does not affect the financing statement with respect to another secured party of record.

(c) A continuation statement that is not filed within the six-month period prescribed by Section 75-9-515(d) is ineffective.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-511. Secured party of record.

(a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under Section 75-9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under Section 75-9-514(b), the assignee named in the amendment is a secured party of record.

(c) A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-512. Amendment of financing statement.

(a) Subject to Section 75-9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e), otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) Identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) If the amendment relates to an initial financing statement filed for record in a filing office described in Section 75-9-501(a) (1), provides the date that the initial financing statement was filed for record and the information specified in Section 75-9-502(b).

(b) Except as otherwise provided in Section 75-9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) An amendment is ineffective to the extent it:

(1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

SOURCES: Derived from former 1972 Code § 75-9-402 [Codes, 1942, § 41A:9-402; Laws, 1966, ch. 316, § 9-402; Laws, 1968, ch. 490, § 1; Laws, 1977, ch. 452, § 25, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(4).

6. Amendment or continuation of security agreement.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-402(4).

6. Amendment or continuation of security agreement.

An appropriate financing statement under UCC § 9-402(1) may perfect security interests that secure advances made under agreements not contemplated at the time the financing statement was filed, even if the filed advances then contemplated should be fully repaid in the interim. Under the code's notice-filing procedures, the filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, regardless of whether the security agreement involved is one that was in existence at the date of such filing, with either an after-acquired property clause or a future-advances clause, or whether the involved security agreement is one that was executed later on. *Chrysler Credit Corp. v. Community Banking Co.*, 35 Conn. Supp. 73, 395 A.2d 727 (1978).

Security agreement entered into in February, 1974, which created valid security interest as between debtor and bank with respect to debtor's accounts receivable, was perfected by existence of record of financing statement, first filed in 1959 and kept current by timely filed continuation statements, filed at regular intervals (in each case just short of five years), showing debtor's accounts receivable as collateral, notwithstanding there were intervals when debtor owed bank nothing, during which time no security interest

existed, and that from 1972 to February, 1974, parties did not intend bank's loans to be secured; duly filed financing statement, showing same debtor, same secured party, and same collateral, serves to perfect security interest created in transaction other than that for which financing statement was originally filed. In *re Gilchrist Co.*, 403 F. Supp. 197 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1246 (3d Cir. Pa. 1976).

In dispute between assignee for benefit of creditors and bank claiming security interest in proceeds from sale of collateral, bank held superior interest under UCC § 9-301(3) where, under New York version of UCC § 9-402, change of name of debtor firm did not affect perfection of filing made under former name, regardless of whether bank had knowledge of change of name. In *re Pasco Sales Co.*, 77 Misc. 2d 724 (1974).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching

creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

A careful reading of UCC § 9-402(4) does not compel a finding that the financing statement must be amended when the security agreement is altered. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

It was not necessary for agreement to

provide for extension or renewal of indebtedness in order that creditor have valid security interest in property covered by security agreement where maker had executed and delivered security agreement to payee containing no provision for renewal or extension of note, financing statement containing no maturity date was filed, maker made payment on original note and executed and delivered to payee renewal note which recited date of original loan and also referred to collateral for original loan, and maker failed to pay note when it became due. In re *Cantrill Constr. Co.*, 418 F.2d 705 (6th Cir. Ky. 1969), cert. denied, 397 U.S. 990, 90 S. Ct. 1124, 25 L. Ed. 2d 398 (1970).

§ 75-9-513. Termination statement.

(a) A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) The debtor did not authorize the filing of the initial financing statement.

(b) To comply with subsection (a), a secured party shall cause the secured party of record to file the termination statement:

(1) Within one (1) month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) If earlier, within twenty (20) days after the secured party receives an authenticated demand from a debtor.

(c) In cases not governed by subsection (a), within twenty (20) days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) The debtor did not authorize the filing of the initial financing statement.

(d) Except as otherwise provided in Section 75-9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in Section 75-9-510, for purposes of Sections 75-9-519(g), 75-9-522(a) and 75-9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

SOURCES: Derived from former 1972 Code § 75-9-404 [Codes, 1942, § 41A:9-404; Laws, 1966, ch. 316, § 9-404; Laws, 1977, ch. 452, § 27; Laws, 1978, ch. 401, § 1; Laws, 1985, ch. 381, § 2, eff from and after July 1, 1985] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Filing requirements to secure payment of oil or gas royalty proceeds, see § 53-3-41.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-404.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-404.

6. In general.

Official Comments to UCC § 9-404(1) make it clear that termination statements are for benefit of debtors and that they are not required to terminate the financing arrangements. In *re Apollo Travel, Inc.*, 567 F.2d 841 (8th Cir. Minn. 1977).

Secured party was under no duty to give personal notice to debtor that secured party had terminated security interest in automobile, since UCC § 9-404(1) does not provide for such notification to debtor in absence of written demand to creditor. *Ford Motor Credit Co. v. Gibson*, 566 S.W.2d 154 (Ky. Ct. App. 1977).

Where seller sold four trucks to buyer in 1969, obtained execution of four separate security agreements (one for each truck) for purchase price of trucks and related costs, and perfected four separate security

interests in trucks by filing, but such security agreements did not specifically subject collateral (the four trucks) to any future advances that might be made by seller to buyer; where bank in 1971 made loan to purchaser of such trucks, took security interest in all equipment then or thereafter owned by purchaser, and also perfected such security interest by filing; where purchaser's obligation to pay seller purchase price of trucks and related costs had been satisfied when bank took possession of trucks and sold them; and where proceeds of such sale were not sufficient to make whole either bank or seller, (1) bank's security agreement entitled it to priority over all collateral (trucks) and proceeds of sale thereof, since seller's prior security agreements did not clearly secure certain future advances-allowed by UCC § 9-204(5)-that were later made by seller to purchaser and all of purchaser's debts to seller, except for such future advances, had been satisfied and seller's security agreements were no longer in effect when bank took possession of proceeds of sale of collateral; (2) bank's priority over collateral and proceeds of sale thereof were not affected by fact that seller's filed financing statements, which were filed when its 1969 security agree-

ments were made, were never released by seller, since UCC § 9-406 does not impose duty to file such release in absence of written demand therefor by debtor to creditor under UCC § 9-404; and (3) bank, at time it took possession of trucks, was entitled to possession by virtue of its security interest and thus was not guilty of conversion of proceeds of sale. *Texas Kenworth Co. v. First Nat'l Bank*, 564 P.2d 222 (Okla. 1977).

Where the debtor under a chattel mortgage had paid off the entire obligation, but

the holder of the paper refused to send a statement that he no longer claimed a security interest under the document, the debtor was not restricted to the rights afforded to her by the Uniform Commercial Code and could properly pursue the remedy given her by § 414(2) of the Personal Property Law which permitted her to recover the amount equal to the credit service charge imposed by the transaction. *Tyler v. Eastern Dist. Corp.*, 55 Misc. 2d 1002 (1968).

RESEARCH REFERENCES

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws §§ 173 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 426 et seq.

Termination statement, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:671-9:674.

Termination statement, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3681 et seq.

CJS. 76 C.J.S., Records §§ 57 et seq.

§ 75-9-514. Assignment of powers of secured party of record.

(a) Except as otherwise provided in subsection (c), an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Except as otherwise provided in subsection (c), a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:

(1) Identifies, by its file number, the initial financing statement to which it relates;

(2) Provides the name of the assignor; and

(3) Provides the name and mailing address of the assignee.

(c) An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under Section 75-9-502(c) may be made only by an assignment of record of the mortgage in the manner provided by law of this state other than the Uniform Commercial Code.

SOURCES: Derived from former 1972 Code § 75-9-405 [Codes, 1942, § 41A:9-405; Laws, 1966, ch. 316, § 9-405; Laws, 1968, ch. 491, § 1; Laws, 1977, ch. 452, § 28; Laws, 1985, ch. 381, § 3, eff from and after July 1, 1985] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Filing requirements to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Recording of assignments of mortgages, etc., see §§ 89-5-15, 89-5-17.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-405.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-405.

6. In general.

Proper filing of financing statement under UCC § 9-405(1) which disclosed on face assignment of security interest in ice cream store equipment fixed status of as-

signee as secured party of record with priority of interest over that of lien creditor under UCC § 9-301 who, after judgment for unpaid rent, attached property and requested sale thereof with full knowledge of assignee's claim to equipment. *Marco Fin. Co. v. Solbert Indus., Inc.*, 534 S.W.2d 469 (Mo. Ct. App. 1975).

Neither assignee nor assignor of real estate mortgage complied with statute concerning assignment of security interest; held, this failure did not affect rights of assignee's receiver against debtors. *Ragge v. Bryan*, 249 Ark. 164, 458 S.W.2d 403 (1970).

RESEARCH REFERENCES

Am Jur. 6A Am. Jur. 2d, Assignments § 71.

66 Am. Jur. 2d, Records and Recording Laws §§ 54 et seq., 173 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 282-284, 462.

By assignee of secured party, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:673.

Assignment of security interest, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3691 et seq.

CJS. 79 C.J.S. Secured Transactions § 134.

6A C.J.S., Assignments § 52.

76 C.J.S., Records §§ 12, 57 et seq.

§ 75-9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement.

(a) Except as otherwise provided in subsections (b), (e), (f), and (g), a filed financing statement is effective for a period of five (5) years after the date of filing.

(b) Except as otherwise provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of thirty (30) years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

(c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural

lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) A continuation statement may be filed only within six (6) months before the expiration of the five-year period specified in subsection (a) or the thirty-year period specified in subsection (b), whichever is applicable.

(e) Except as otherwise provided in Section 75-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five (5) years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection (c), unless, before the lapse, another continuation statement is filed pursuant to subsection (d). Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) If a debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) A record of a mortgage that is effective as a financing statement filed as a fixture filing under Section 75-9-502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

SOURCES: Derived from former 1972 Code § 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Filing requirements to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Application of this section to filing or refiling of federal tax liens, see § 85-8-9.

Recording of deeds and conveyances, see §§ 89-5-1 to 89-5-5.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-403.

A. Decisions Under Uniform Commercial Code.

6. In general.
7. Date of filing.
8. Indexing of financing statement.
9. Effect of name change after filing.
10. Duration of financing statement.
11. Continuation statement.
12. Effect of lapsed financing statement.
13. Other matters.

B. Decisions Under Former Statutes.

14. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-403.

A. Decisions Under Uniform Commercial Code.

6. In general.

Sections 65 and 70 of the New York Personal Property Law which provide the effect and method of filing conditional sales contracts have now been superseded

by §§ 9-402 and 9-403(1) of the UCC. In re Mutual Bd. & Packaging Corp., 342 F.2d 294 (2d Cir. N.Y. 1965).

A conditional sales contract in proper form and timely filed with correct recording office has been filed in compliance with this section even though recorder erroneously returned instrument for an acknowledgment. In re Mutual Bd. & Packaging Corp., 342 F.2d 294 (2d Cir. N.Y. 1965).

The purpose of filing a financial statement is to give notice to potential future creditors of the debtor or purchasers of the collateral. Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960).

The Uniform Commercial Code does not require that the secured party as listed in a financing statement be a principal creditor and not an agent. Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960).

7. Date of filing.

Date stamp and filing number on financing statement were prima facie evidence of filing with city register's office on that date, notwithstanding evidence that on later date financing statement temporarily could not be found; debtor's contention that secured party had duty to insure proper filing and indexing was without merit. In re May Lee Indus., Inc., 380 F. Supp. 1 (S.D.N.Y. 1974), aff'd, 501 F.2d 1407 (2d Cir. N.Y. 1974).

8. Indexing of financing statement.

Presentation of financing statement to, and its acceptance by, filing officer constitutes filing under UCC § 9-403(1), and secured party is not insurer of proper indexing of statement by filing officer. In re Hammons, 438 F. Supp. 1143 (S.D. Miss. 1977), rev'd on other grounds, 614 F.2d 399 (5th Cir. 1980).

Under Mississippi UCC § 9-403(4), clerk's duty is simply to index names of debtors as they are listed by creditor on financing statement, and clerk is under no duty to index debtors' names as they appear on signature line of financing statement. In re Hammons, 438 F. Supp. 1143 (S.D. Miss. 1977), rev'd on other grounds, 614 F.2d 399 (5th Cir. 1980).

9. Effect of name change after filing.

Secured creditor who had knowledge at time of execution of security agreement that debtor contemplated at future time changing its name to particular new name, but who nevertheless proceeded to extend credit knowing that original filing of financing statement would not reflect change and would therefore mislead and deceive potential creditors and purchasers, forfeited his protected interest when change of name occurred. In re Kalamazoo Steel Process, Inc., 503 F.2d 1218 (6th Cir. Mich. 1974).

Where financing statement was properly filed and debtor subsequently changed its corporate name, secured party was not under obligation to refile its financing statement to reflect such change of name notwithstanding secured party had knowledge of the change. Continental Oil Co. v. Citizens Trust & Sav. Bank, 57 Mich. App. 1, 225 N.W.2d 209 (1974), aff'd, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

10. Duration of financing statement.

Failure of creditor with perfected purchase money security interest to renew original filing relegated creditor to standing of unperfected secured creditor; creditor did not reperfect its purchase money lien upon repossession of collateral, due to 20-day perfection requirement. United States v. Williams, 82 B.R. 430 (Bankr. N.D. Miss. 1988).

Creditor's filing of financing statement without debtor's signature, several months subsequent to lapse of original financing statement, was sufficient to renew perfection of security interest effective as of date of filing of second financing statement, however, the creditor was not protected during interim period between date of lapse and date of refiling. In re Abell, 66 B.R. 375 (Bankr. N.D. Miss. 1986).

In action between creditors for possession of debtors' (husband and wife) collateral, where (1)(a) plaintiff creditor's security agreement, which did not provide for future advances, covered debtors' household furnishings, (b) plaintiff properly filed financing statement on December 20, 1973, (c) debt was fully paid on November 8, 1974, and (d) plaintiff did not file ter-

mination statement, (2) defendant creditor's security agreement covered essentially the same property, and defendant properly filed financing statement on January 3, 1975, (3)(a) plaintiff creditor, on July 11, 1975, December 1, 1975, and July 2, 1976, made new loans to debtors, (b) debtors executed new security agreements covering same collateral first pledged in 1973, and (c) plaintiff relied on December 20, 1973 financing statement, (4) debtors filed petition in bankruptcy on September 23, 1976, and (5) defendant creditor, on September 30, 1976, seized property covered by both plaintiff's and defendant's perfected security interests, court held (1) that all loans made by plaintiff and defendant, except plaintiff's July 2, 1976 loan, were governed by pre-1972 UCC § 9-312(5)(a), which determined priority between conflicting security interests in same collateral by order of filing if both were perfected by filing, (2) under pre-1972 UCC § 9-312(5)(a), plaintiff's security interest in collateral for plaintiff's July 11, 1975 and December 1, 1975 loans, which was perfected at time such loans were made, had priority over defendant's security interest in the same collateral because plaintiff was the first to file, (3) such priority was not affected by fact that plaintiff's original loan, which was covered by plaintiff's filed financing statement of December 20, 1973, had been paid off, since under pre-1972 UCC § 9-403(2), a financing statement specifying no maturity date was effective for five years from date of its filing, and debtors had not requested that they be sent a termination statement, (4) under UCC § 9-312(7), which was added to Uniform Commercial Code in 1972, plaintiff's July 2, 1976 advance had same priority as plaintiff's December 1, 1975 advance, thus giving plaintiff's July 2, 1976 loan priority over defendant's loan, (5) since only one of the debtors-the wife-had properly signed plaintiff's December 20, 1973 financing statement, plaintiff's security interest had priority over defendant's security interest only to extent of wife's interest in the collateral, and (6) conversely, defendant's security interest in property of husband, and also in property of wife that was not listed in plaintiff's

December 20, 1973 financing statement, had priority over plaintiff's security interest under pre-1972 UCC § 9-301(1)(a) and § 9-312(5)(a). *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 245 S.E.2d 510 (1978), cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

A perfected security interest in automobile or in chattel paper relating thereto can last no longer than 5 years from date of filing under UCC § 9-403(2). *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971).

11. Continuation statement.

Where (1) debtor on June 24, 1974 obtained loan from creditor which was secured by security agreement covering debtor's accounts receivable, (2) creditor filed financing statement that contained expiration date of September 25, 1974, (3) creditor subsequently extended time for payment of loan but did not file timely continuation statement to extend expiration date of original financing statement, with result that under Colorado UCC § 9-403(2), original financing statement lapsed and creditor's security interest became unperfected on November 24, 1974 (60 days after expiration date specified in original financing statement), (4) debtor on December 26, 1974 repaid creditor part of amount due on loan, (5) creditor on February 24, 1975 filed late continuation statement under Colorado UCC § 9-403(3), (6) creditor on March 21, 1975 acted to recover some of debtor's accounts receivable, and (7) debtor was adjudicated bankrupt on April 10, 1975 and bankruptcy trustee sought to avoid creditor's December, 1974 and March, 1975 transactions with debtor on ground that they were preferential transfers because they were not made within four months of filing of debtor's bankruptcy petition, creditor, who admitted that transaction were chronologically within such four-month period, could not successfully defend transactions by contending that under "perfection" test of bankruptcy laws, creditor's security interest had remained continuously perfected, under special provisions of Colorado UCC § 9-403(3) dealing with effect of failure to file timely continuation statement, from June 24, 1974 and that transfers must thus be

deemed to have been made on such date (that is, more than four months before debtor's bankruptcy petition) because no other creditors had actually acquired any rights against debtor during interim period that preceded creditor's filing of late continuation statement. In such case, although procedure to be followed in perfecting security interest in property of a bankrupt debtor is determined by state law, time when perfection becomes effective against bankruptcy trustee is determined by federal law, and in present case, express requirement of bankruptcy law that interests of both potential and actual creditors of bankrupt debtor must be considered in determining whether a given transfer is perfected as against bankruptcy trustee could not be nullified, as contended by creditor, by fact that Colorado courts would interpret Colorado UCC § 9-403(3) to give priority only to those creditors who actually acquired rights against debtor during interim period between lapse of original financing statement and late filing of continuation statement. In *re Vodco Volume Dev. Co.*, 567 F.2d 967 (10th Cir. Colo. 1977), appeal dismissed, cert. denied, 439 U.S. 806, 99 S. Ct. 62, 58 L. Ed. 2d 98 (1978).

UCC § 9-403(3) requires filing of continuation statement within six months' period prior to expiration of five-year period during which original financing statement is effective; thus, where bank filed continuation statement almost two years prior to prescribed period, filing was premature and did not extend effective date of original financing statement beyond its expiration date. In *re Callahan Motors, Inc.*, 396 F. Supp. 785 (D.N.J. 1975), rev'd, 538 F.2d 76 (3rd Cir. N.J. 1976), cert. denied, 429 U.S. 987, 97 S. Ct. 507, 50 L. Ed. 2d 598 (1976).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971, with respect to "leased" tract, where original fi-

nancing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

Filing of new financing statement which was substantially rewrite of original loan and which did not identify original statement by file number or state that original financing statement was still effective could not be viewed as substantial compliance with Code requirement that continuation statement be filed. *Eastern Ind. Prod. Credit Ass'n v. Farmers State Bank*, 31 Ohio App. 2d 252, 287 N.E.2d 824 (1972).

Because the garnishee chose to insert the maturity date of the obligation as a "demand" obligation, which apparently is made optional at most by UCC § 9-402(1), a continuation statement was not necessary in order to maintain perfection until five years has elapsed from the date of the initial filing. *Mid-Eastern Elecs., Inc. v. First Nat'l Bank*, 455 F.2d 141 (4th Cir. Md. 1970).

12. Effect of lapsed financing statement.

Failure of creditor with perfected purchase money security interest to renew original filing relegated creditor to standing of unperfected secured creditor; creditor did not reperfect its purchase money lien upon repossession of collateral, due to 20-day perfection requirement. *United States v. Williams*, 82 B.R. 430 (Bankr. N.D. Miss. 1988).

Where effectiveness of secured party's filed financing statement lapsed after passage of period prescribed by UCC § 9-403(2) because no continuation statement was timely filed under UCC § 9-403(3), secured party's security interest in reserve account fund became unperfected and was subordinate to federal tax liens against debtor that antedated date on

which secured party subsequently reperfected his security interest in fund by filing new financing statement. *GECC v. Isaacs*, 90 Wash. 2d 234, 581 P.2d 1032 (1978).

A perfected security interest which lapses under UCC 9-403(2) becomes unperfected as against all other interests, including those perfected security interests which were previously junior to it, and is therefore junior to any perfected security interest. *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wash. 2d 195, 579 P.2d 1341 (1978).

In estate administration proceeding, where (1) deceased, on purchase of pharmacy, gave seller promissory note secured by security agreement that was duly filed in county clerk's office on December 1, 1971 and with secretary of state of New York on December 2, 1971, (2) filed instruments reflected maturity date of November 15, 1981, (3) decedent left unpaid balance on promissory note given seller, and (4) seller did not renew his security interest by filing continuation statement, as provided by UCC § 9-403(2), on or before December 2, 1976 (which was expiration of 5-year period specified by UCC § 9-403(2)), court held that seller forfeited his preferred standing and became mere general creditor of deceased. *In re Estate of Sweeney*, 95 Misc. 2d 22 (1978).

A creditor of a decedent, who had duly filed a security agreement but failed to renew his security interests by failing to file renewal certificates, as required by section 9-403 of the Uniform Commercial Code, which provides that the effectiveness of a filing statement lapses on the expiration of a five-year period unless a continuation statement is filed prior to the lapse, thereby forfeited his secured and preferred standing and became a general creditor with respect to the assets of decedent's estate. *In re Estate of Sweeney*, 95 Misc. 2d 22 (1978).

Buyer who purchased goods subject to security interest perfected by filing of financing statement would take priority over secured party after financing statement lapsed provided buyer was without notice at time of expiration of financing statement. *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974).

13. Other matters.

Typewritten signature of secured creditor on continuation statement is sufficient where continuation statement clearly imparted notice of potential security interest, identified secured party, and was executed with present intent to authenticate; financing statements are properly filed when they are presented to filing clerk and filing fees paid; if filing officer jeopardizes rights of creditor by rejecting tendered document later held to be proper and legally sufficient, loss is not attributable to creditor; better practice for filing officers is to file documents they deem questionable and then notify filing party of possible defects. *Multi-Mart Branch Office, First State Bank v. Appliance Buyers Credit Corp.*, 757 F.2d 1573 (5th Cir. 1985).

While both the time of filing rule and the time of attachment rule have merit, neither rule furthers the important policy of providing notice to subsequent creditors of the prior existing security interest as well as a rule based upon the last event; by requiring that the determination of the proper place to file be made at the time when the last event occurs upon which the perfection of the creditor's security interest is based, the last event rule insures that the place in which the filing is made and the contents of the filing will reflect any changes made by the debtor between the time of attachment and the time of filing, regardless of which came first. The filer would be more likely to reflect the location and status of the debtor which exists at the time a subsequent creditor is searching the records to determine what prior security interests have been perfected against the debtor and therefore will be more likely to be found by such a subsequent creditor. Accordingly, the secured party must determine the correct place in which to file his financing statement on the basis of the facts existing at the time when the last event necessary for the perfection of his security interests occurs. *Borg-Warner Acceptance Corp. v. Fedders Fin. Corp.*, 614 F.2d 399 (5th Cir. 1980).

Under evidence that the debtor had signed a security agreement authorizing the filing of a financing statement without

her signature, that the motor vehicle was covered by the security agreement, and that the debtor had signed and delivered a promissory note to plaintiff, the fact that finance company failed to check the box opposite the provision that the debtor had signed a security agreement authorizing plaintiff to file the financing statement was a minor error which could not seriously mislead one who searched the file. *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc.*, 32 A.D.2d 643 (2d Dep't 1969).

The assignment in a building subcontractor's performance bond, to his surety, of all sums due and to become due to the subcontractor under his contract with the primary contractor, in the event of any abandonment, forfeiture, or breach of the subcontract by the subcontractor, was a "contract right" under § 9-301, and where not perfected under §§ 9-302 and 9-403 by appropriate recording, was invalid

against a lien creditor, including a trustee in bankruptcy, from the date of the filing of the petition; hence, the surety was relegated to the status of a general creditor, with no lien on funds owing from the contractor to the bankrupt and paid into court. *United States ex rel. Greer v. G.P. Fleetwood & Co.*, 165 F. Supp. 723 (W.D. Pa. 1958).

B. Decisions Under Former Statutes.

14. In general.

Where the financing statements were presented to the chancery clerk, the filing fees paid, and the statements recorded, they constituted constructive notice to a lien creditor of the trustee under the provisions of subsection 4, despite the fact that they were incorrectly indexed under the name of the finance company rather than under the name of the automobile dealer. *Murdock Acceptance Corp. v. Woodham*, 208 So. 2d 56 (Miss. 1968).

ATTORNEY GENERAL OPINIONS

Subsection (3) of this section permits a chancery clerk to remove a lapsed financing statement from the files and destroy same immediately after one year after the financing statement has lapsed, unless

such financing statement has been continued by a continuation statement or is still effective under subsection (6) of this section. *Miller*, May 21, 1999, A.G. Op. #99-0238.

RESEARCH REFERENCES

ALR. Registration of mortgages or other liens on personal property in case of residents of other states. 10 A.L.R.2d 764.

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws §§ 54 et seq., 173 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 313, 405, 409, 412.

5A Am. Jur. Pl & Pr Forms (Rev), Chattel Mortgages, Forms 21 et seq. (filing or recording).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:651-9:653, 9:661 (what constitutes filing financing and continuation statements).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3671, 253:2672 (duration and renewal of filing).

CJS. 79 C.J.S., Secured Transactions §§ 50 et seq.

76 C.J.S., Records §§ 12, 57 et seq.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss L. J. 741, December 1979.

§ 75-9-516. What constitutes filing; effectiveness of filing.

(a) Except as otherwise provided in subsection (b), communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) The record is not communicated by a method or medium of communication authorized by the filing office;

(2) An amount equal to or greater than the applicable filing fee is not tendered;

(3) The filing office is unable to index the record because:

(A) In the case of an initial financing statement, the record does not provide a name for the debtor;

(B) In the case of an amendment or correction statement, the record:

(i) Does not identify the initial financing statement as required by Section 75-9-512 or 75-9-518, as applicable; or

(ii) Identifies an initial financing statement whose effectiveness has lapsed under Section 75-9-515;

(C) In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or

(D) In the case of a record filed, or filed for record, in the filing office described in Section 75-9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) Provide a mailing address for the debtor;

(B) Indicate whether the debtor is an individual or an organization;

or

(C) If the financing statement indicates that the debtor is an organization, provide:

(i) A type of organization for the debtor;

(ii) A jurisdiction of organization for the debtor; or

(iii) An organizational identification number for the debtor or indicate that the debtor has none;

(6) In the case of an assignment reflected in an initial financing statement under Section 75-9-514(a) or an amendment filed under Section 75-9-514(b), the record does not provide a name and mailing address for the assignee; or

(7) In the case of a continuation statement, the record is not filed within the six-month period prescribed by Section 75-9-515(d).

(c) For purposes of subsection (b):

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by Section 75-9-512, 75-9-514 or 75-9-518, is an initial financing statement.

(d) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b), is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

SOURCES: Derived from former 1972 Code § 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-517. Effect of indexing errors.

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-518. Claim concerning inaccurate or wrongfully filed record.

(a) A person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

(b) A correction statement must:

(1) Identify the record to which it relates by:

(A) The file number assigned to the initial financing statement to which the record relates; and

(B) If the correction statement relates to a record filed for record in a filing office described in Section 75-9-501(a)(1), the date that the initial financing statement was filed for record and the information specified in Section 75-9-502(b);

(2) Indicate that it is a correction statement; and

(3) Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

SUBPART 2.

DUTIES AND OPERATION OF FILING OFFICE.

SEC.

75-9-519. Numbering, maintaining, and indexing records; communicating information provided in records.

75-9-520.	Acceptance and refusal to accept record.
75-9-521.	Uniform form of written financing statement and amendment.
75-9-522.	Maintenance and destruction of records.
75-9-523.	Information from filing office; sale or license of records.
75-9-524.	Delay by filing office.
75-9-525.	Fees.
75-9-526.	Filing-office rules.
75-9-527.	Duty to report.

§ 75-9-519. Numbering, maintaining, and indexing records; communicating information provided in records.

(a) For each record filed in a filing office, the filing office shall:

(1) Assign a unique number to the filed record;

(2) Create a record that bears the number assigned to the filed record and the date and time of filing;

(3) Maintain the filed record for public inspection; and

(4) Index the filed record in accordance with subsections (c), (d), and (e).

(b) Except as provided in subsection (i), a file number assigned after January 1, 2002, must include a digit that:

(1) Is mathematically derived from or related to the other digits of the file number; and

(2) Aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

(c) Except as otherwise provided in subsections (d) and (e), the filing office shall:

(1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, it must be filed for record and the filing office shall index it:

(1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) To the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under Section 75-9-514(a) or an amendment filed under Section 75-9-514(b):

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of this state provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) The filing office shall maintain a capability:

(1) To retrieve a record by the name of the debtor and:

(A) If the filing office is described in Section 75-9-501(a)(1), by the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed for record; or

(B) If the filing office is described in Section 75-9-501(a)(2), by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) The filing office may not remove a debtor's name from the index until one (1) year after the effectiveness of a financing statement naming the debtor lapses under Section 75-9-515 with respect to all secured parties of record.

(h) Except as provided in subsection (i), the filing office shall perform the acts required by subsections (a) through (e) at the time and in the manner prescribed by filing-office rule, but not later than two (2) business days after the filing office receives the record in question.

(i) Subsections (b) and (h) do not apply to a filing office described in Section 75-9-501(a)(1).

SOURCES: Derived from former 1972 Code §§ 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] and 75-9-405 [Codes, 1942, § 41A:9-405; Laws, 1966, ch. 316, § 9-405; Laws, 1968, ch. 491, § 1; Laws, 1977, ch. 452, § 28; Laws, 1985, ch. 381, § 3, eff from and after July 1, 1985] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-520. Acceptance and refusal to accept record.

(a) A filing office shall refuse to accept a record for filing for a reason set forth in Section 75-9-516(b) and may refuse to accept a record for filing only for a reason set forth in Section 75-9-516(b).

(b) If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing-office rule but, in the case of a filing office described in Section 75-9-501(a)(1), in no event more than two (2) business days after the filing office receives the record.

(c) A filed financing statement satisfying Section 75-9-502(a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a). However, Section 75-9-338 applies to a filed financing statement providing information described in Section 75-9-516(b)(5) which is incorrect at the time the financing statement is filed.

(d) If a record communicated to a filing office provides information that relates to more than one (1) debtor, this part applies as to each debtor separately.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-521. Uniform form of written financing statement and amendment.

(a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Section 75-9-516(b).

(b) A filing office that accepts written records may not refuse to accept a written record in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Section 75-9-516(b).

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-522. Maintenance and destruction of records.

(a) The filing office shall maintain a record of the information provided in a filed financing statement for at least one (1) year after the effectiveness of the financing statement has lapsed under Section 75-9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and:

(1) If the record was filed or recorded in the filing office described in Section 75-9-501(a)(1), by using the file number assigned to the initial financing statement to which the record relates and the date that the record was filed for record; or

(2) If the record was filed in the filing office described in Section 75-9-501(a)(2), by using the file number assigned to the initial financing statement to which the record relates.

(b) Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a).

SOURCES: Derived from former 1972 Code § 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-523. Information from filing office; sale or license of records.

(a) If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to Section 75-9-519(a)(1) and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to Section 75-9-519(a)(1) and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to Section 75-9-519(a)(1); and

(3) The date and time of the filing of the record.

(c) The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the filing office, but not a date earlier than three (3) business days before the filing office receives the request, any financing statement that:

(A) Designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request;

(B) Has not lapsed under Section 75-9-515 with respect to all secured parties of record; and

(C) If the request so states, has lapsed under Section 75-9-515 and a record of which is maintained by the filing office under Section 75-9-522(a);

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) In complying with its duty under subsection (c), the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing its written certificate or, if so requested in writing, a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity.

(e) The filing office shall perform the acts required by subsections (a) through (d) at the time and in the manner prescribed by filing-office rule, but, in the case of a filing office described in Section 75-9-501(a)(2), not later than two (2) business days after the filing office receives the request.

(f) At least weekly, the filing office shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office. This subsection shall apply only to records filed in a filing office described in Section 75-9-501(a)(2).

SOURCES: Derived from former 1972 Code § 75-9-407 [Codes, 1942, § 41A:9-407; Laws, 1968, ch. 492, § 1; Laws, 1977, ch. 452, § 30; Laws, 1985, ch. 381,

§ 5, eff from and after July 1, 1985] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-407.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-407.

6. In general.

Language of New York version of UCC § 9-407, pertaining to obtaining information from filing officer, is mandatory and not discretionary. Thus, filing officer's erroneous certification to inquirer that there was no record on file of any financing

statement pertaining to debtor was not discretionary act, but was actionable error committed in performance of ministerial duty. *Hudleasco, Inc. v. State*, 90 Misc. 2d 1057 (1977), aff'd, 63 A.D.2d 1042, 405 N.Y.S.2d 784 (3d Dep't 1978).

Where financing statement was properly filed and debtor subsequently changed its corporate name, secured party was not under obligation to refile its financing statement to reflect such change of name notwithstanding secured party had knowledge of the change. *Continental Oil Co. v. Citizens Trust & Sav. Bank*, 57 Mich. App. 1, 225 N.W.2d 209 (1974), aff'd, 397 Mich. 203, 244 N.W.2d 243, 99 A.L.R.3d 1179 (1976).

ATTORNEY GENERAL OPINIONS

Under Section 75-9-407(2) the Office of the Secretary of State may establish a procedure for "expedited" search requests for financing statements. However, the

Secretary of State may not assess an additional fee for such search requests. Philip, August 2, 1996, A.G. Op. #96-0401.

RESEARCH REFERENCES

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws §§ 195 et seq.

68A Am. Jur. 2d, Secured Transactions §§ 412, 421, 423.

Request to filing officer for information as to existence of and copy of filed financing statement, 6 Am. Jur. Pl & Pr Forms

(Rev), Secured Transactions, Form 9:654.

Information from filing officer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3711, 253:3712.

CJS. 76 C.J.S., Records §§ 57 et seq.

§ 75-9-524. Delay by filing office.

Delay by the filing office beyond a time limit prescribed by this part is excused if:

(1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) The filing office exercises reasonable diligence under the circumstances.

SOURCES: Derived from 1972 Code § 75-4-109 [Formerly § 75-4-108: Codes, 1942, § 41A:4-108; Laws, 1966, ch. 316, § 4-108; Laws, 1992, ch. 420, § 80, eff

from and after January 1, 1993] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-525. Fees.

[Until December 31, 2007, this section shall read as follows:]

(a) Except as otherwise provided in subsection (e), the fee for filing and indexing a record under this part, other than an initial financing statement of the kind described in subsection (b) is the amount specified in subsection (c), if applicable, plus:

(1) Ten Dollars (\$10.00) if the record is communicated in writing and is in the standard form prescribed by the Secretary of State;

(2) Thirteen Dollars (\$13.00) if the record is communicated in writing and is not in the standard form prescribed by the Secretary of State; and

(3) Eight Dollars (\$8.00) if the record is communicated by another medium authorized by filing-office rule.

(b) Except as otherwise provided in subsection (e), the fee for filing and indexing an initial financing statement of the following kind is the amount specified in subsection (c), if applicable, plus:

(1) Thirteen Dollars (\$13.00) if the financing statement indicates that it is filed in connection with a public-finance transaction;

(2) Ten Dollars (\$10.00) if the financing statement indicates that it is filed in connection with a manufactured-home transaction.

(c) Except as otherwise provided in subsection (e), if a record is communicated in writing, the fee for each additional debtor name more than one (1) required to be indexed is Four Dollars (\$4.00).

(d) The fee for responding to a request for information from the filing office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, is:

(1) Five Dollars (\$5.00) if the request is communicated in writing on the standard form prescribed by the Secretary of State;

(2) Ten Dollars (\$10.00) if the request is communicated in writing and is not in the standard form prescribed by the Secretary of State;

(3) Three Dollars (\$3.00) if the request is communicated by another medium authorized by filing-office rule; and

(4) An additional fee of Two Dollars (\$2.00) shall be paid by the requesting party for each financing statement listed on the filing officer's certificate, the aggregate of which shall be billed to the requesting party at the time the filing officer's certificate is issued.

(e) This section does not require a fee to the chancery clerk with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under Section 75-9-502(c). However, the recording and satisfaction fees to the chancery clerk that otherwise would be applicable under Section 25-7-9 to the record of the mortgage apply.

[From and after December 31, 2007, this section shall read as follows:]

(a) Except as otherwise provided in subsection (e), the fee for filing and indexing a record under this part, other than an initial financing statement of the kind described in subsection (b) is the amount specified in subsection (c), if applicable, plus:

(1) Five Dollars (\$5.00) if the record is communicated in writing and is in the standard form prescribed by the Secretary of State;

(2) Eight Dollars (\$8.00) if the record is communicated in writing and is not in the standard form prescribed by the Secretary of State; and

(3) Three Dollars (\$3.00) if the record is communicated by another medium authorized by filing-office rule.

(b) Except as otherwise provided in subsection (e), the fee for filing and indexing an initial financing statement of the following kind is the amount specified in subsection (c), if applicable, plus:

(1) Eight Dollars (\$8.00) if the financing statement indicates that it is filed in connection with a public-finance transaction;

(2) Five Dollars (\$5.00) if the financing statement indicates that it is filed in connection with a manufactured-home transaction.

(c) Except as otherwise provided in subsection (e), if a record is communicated in writing, the fee for each additional debtor name more than one (1) required to be indexed is Four Dollars (\$4.00).

(d) The fee for responding to a request for information from the filing office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, is:

(1) Five Dollars (\$5.00) if the request is communicated in writing on the standard form prescribed by the Secretary of State;

(2) Ten Dollars (\$10.00) if the request is communicated in writing and is not in the standard form prescribed by the Secretary of State;

(3) Three Dollars (\$3.00) if the request is communicated by another medium authorized by filing-office rule; and

(4) An additional fee of Two Dollars (\$2.00) shall be paid by the requesting party for each financing statement listed on the filing officer's certificate, the aggregate of which shall be billed to the requesting party at the time the filing officer's certificate is issued.

(e) This section does not require a fee to the chancery clerk with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under Section 75-9-502(c). However, the recording and satisfaction fees to the chancery clerk that otherwise would be applicable under Section 25-7-9 to the record of the mortgage apply.

SOURCES: Derived from former 1972 Code § 75-9-403 [Codes, 1942, § 41A:9-403; Laws, 1966, ch. 316, § 9-403; Laws, 1977, ch. 452, § 26; Laws, 1978, ch. 401, § 8; Laws, 1979, ch. 369; Laws, 1985, ch. 381, § 1; Laws, 1987, ch. 373, eff from and after July 1, 1987] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-526. Filing-office rules.

(a) The Secretary of State shall adopt and publish rules to implement this article. The filing-office rules must be:

- (1) Consistent with this article; and
- (2) Adopted and published in accordance with the Mississippi Administrative Procedures Act.

(b) To keep the filing-office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part, the Secretary of State, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing filing-office rules, shall:

- (1) Consult with filing offices in other jurisdictions that enact substantially this part; and
- (2) Consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and
- (3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-527. Duty to report.

The Secretary of State shall report annually on or before January 2 to the Legislature on the operation of the filing office. The report must contain a statement of the extent to which:

- (1) The filing-office rules are not in harmony with the rules of filing offices in other jurisdictions that enact substantially this part and the reasons for these variations; and
- (2) The filing-office rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators, or any successor organization, and the reasons for these variations.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

PART 6.

DEFAULT.

Subpart 1.	Default and Enforcement of Security Interest.....	75-9-601
Subpart 2.	Noncompliance With Article.....	75-9-625

Editor’s Note — Many of the notes found under this part originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current

location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under "Judicial Decisions" were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

SUBPART 1.

DEFAULT AND ENFORCEMENT OF SECURITY INTEREST.

SEC.

- 75-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.
- 75-9-602. Waiver and variance of rights and duties.
- 75-9-603. Agreement on standards concerning rights and duties.
- 75-9-604. Procedure if security agreement covers real property or fixtures.
- 75-9-605. Unknown debtor or secondary obligor.
- 75-9-606. Time of default for agricultural lien.
- 75-9-607. Collection and enforcement by secured party.
- 75-9-608. Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.
- 75-9-609. Secured party's right to take possession after default.
- 75-9-610. Disposition of collateral after default.
- 75-9-611. Notification before disposition of collateral.
- 75-9-612. Timeliness of notification before disposition of collateral.
- 75-9-613. Contents and form of notification before disposition of collateral: general.
- 75-9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.
- 75-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.
- 75-9-616. Explanation of calculation of surplus or deficiency.
- 75-9-617. Rights of transferee of collateral.
- 75-9-618. Rights and duties of certain secondary obligors.
- 75-9-619. Transfer of record or legal title.
- 75-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.
- 75-9-621. Notification of proposal to accept collateral.
- 75-9-622. Effect of acceptance of collateral.
- 75-9-623. Right to redeem collateral.
- 75-9-624. Waiver.

§ 75-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) After default, a secured party has the rights provided in this part and, except as otherwise provided in Section 75-9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) A secured party in possession of collateral or control of collateral under Section 75-9-104, 75-9-105, 75-9-106, or 75-9-107 has the rights and duties provided in Section 75-9-207.

(c) The rights under subsections (a) and (b) are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) and Section 75-9-605, after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) The date of perfection of the security interest or agricultural lien in the collateral;

(2) The date of filing a financing statement covering the collateral; or

(3) Any date specified in a statute under which the agricultural lien was created.

(f) A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(g) Except as otherwise provided in Section 75-9-607(c), this part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

SOURCES: Derived from former 1972 Code § 75-9-501 [Codes, 1942, § 41A:9-501; Laws, 1966, ch. 316, § 9-501; Laws, 1977, ch. 452, § 32, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Attachment in chancery, see §§ 11-31-1 et seq.

Attachment at law, see §§ 11-33-1 et seq.

Executions, see §§ 13-3-111 et seq.

Variations of provisions of this Code by agreement, see § 75-1-102(3).

Definitions, see § 75-9-102.

Scope of Article, see § 75-9-109.

Secured party's rights on disposition of collateral, see § 75-9-315.

Ineffective restrictions, see § 75-9-408, § 75-9-409.

Collection and enforcement by secured party after default, see § 75-9-607.

Procedures after default: liability for deficiency and right to surplus, see § 75-9-608.

Disposition of collateral after default, see § 75-9-610.

Notification of proposal to accept collateral, see § 75-9-621.

Determination of whether conduct was commercially reasonable, see § 75-9-627.

Right to redeem collateral, see § 75-9-623.

JUDICIAL DECISIONS

I. Under Current Law.

II. Under former § 75-9-501(1), (2), (5).

1.-5. [Reserved for future use.]

6. In general.

7. Alternative and cumulative nature of remedies.
8. —Deficiency judgment.
9. Acceleration of obligation.
10. Sale of collateral by secured party.
11. —Notice of sale.
12. —Waiver of right to notice.
13. Unauthorized sale of collateral by debtor.
14. Foreclosure procedures under state law.
15. Proceedings involving both real and personal property.
16. Priorities among competing creditors.
17. Waivers of rights or remedies.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-501(1), (2), (5).

6. In general.

Although security interests in personal property created by Uniform Commercial Code can be enforced under UCC § 9-501(1) by “any available judicial procedure,” such an interest cannot be enforced under Mississippi “Summons and Seizure” law (also known as Mississippi “Enforceable Lien Statute”) because a UCC security interest in personal property is not included among liens set forth in the summons and seizure law. *Burns v. Delta Loans, Inc.*, 354 So. 2d 268 (Miss. 1978).

The obvious purpose of UCC § 9-501(1) and (5) is to abolish the doctrine of election of remedies. *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978).

Lack of perfection of security interest under Article 9 of UCC relates only to priority over other creditors’ interests in collateral, and security agreement as between parties themselves and second party’s rights over collateral as against debtor are unaffected by failure to perfect security interest; thus, assignee for security purposes of beneficial interest in land trust was entitled to redeem from tax sale of real estate which comprised corpus of trust notwithstanding his failure to perfect security interest by filing financial statement. *Application of County Treasurer of Du Page County* (App. 2 Dist.1973) 16 Ill.App. 3d 385, 306 N.E.2d 743

Under Code §§ 9-306 and 9-601, secured party given rights only against debtor not against purchaser therefrom; secured party had no right of action in assumpsit against purchaser, either for original debt or for proceeds of resale. *Beneficial Fin. Co. v. Colonial Trading Co.*, 43 Pa. D. & C.2d 131 (1967).

The secured party is not entitled to rescind the transaction merely because the debtor has defaulted. *Monroe Capital Corp. v. Pom-Pom Lunch & Restaurant, Inc.*, 4 U.C.C. Rep. Serv. 511 (1967, NY Sup).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

7. Alternative and cumulative nature of remedies.

The right of set-off exists even if a bank’s indebtedness is secured by collateral. Thus, in a case where a security agreement and note executed by the plaintiff to obtain an automobile loan gave the bank authority to set-off or charge the note against any deposit account or any other account maintained by the plaintiff with the bank without notice to the plaintiff, the bank acted properly when it set-off the savings account deposit of the plaintiff against the debt which was then in default. *Duncan v. Coahoma Bank*, 397 So. 2d 891 (Miss. 1981).

Under the Uniform Commercial Code, a secured creditor may choose between two basic methods of getting his money out of a balky debtor. First, he can seize the goods subject to his security interest and either keep them in satisfaction of the debt or resell them and apply the proceeds to the debt. Alternatively, he can ignore his security interest, obtain a judgment on the underlying obligation, and proceed by execution and levy. However, although a secured creditor’s remedies are “cumulative” under UCC § 9-501(1), he must choose which remedy he will utilize and

pursue it to fruition. In other words, he may first attempt to enforce his rights by one method and, if it proves unsuccessful, utilize another, but he should not be permitted to harrass the debtor by simultaneously pursuing two or more methods of attack that are open to him. *Insurance Co. of N. Am. v. GECC*, 119 Ariz. 97, 579 P.2d 601 (Ct. App. 1978).

Where secured party obtained default judgment on debtor's promissory notes covering loans on two vehicles and then, after failure of its attempted levy on vehicles, sought to replevy them pursuant to provisions of its security agreement with debtor, court held (1) that under UCC §§ 9-501(1) and (5) and Official Comment 6, secured party was not precluded from replevying vehicles under the security agreement by first having obtained default judgment on the debt; (2) that plaintiff's security interest in vehicles did not merge into such judgment because plaintiff had two separate causes of action, namely, to reduce debt to judgment and to foreclose under its security agreement; (3) that UCC §§ 9-501(1) and (5) were intended to abolish doctrine of election of remedies; (4) that New Mexico UCC § 9-504(2) (not part of Official UCC), which provides that debtor is liable for any deficiency except where collateral is consumer goods, did not prevent plaintiff from replevying vehicles in suit, which were consumer goods, since New Mexico UCC § 9-504(2), by its own terms, contemplated a "deficiency"; (5) that there could be no deficiency in present case until there had been a repossession and sale of consumer goods constituting debtor's collateral; and (6) that until such sale and an attempt to collect any resulting deficiency, debtor had not been injured. *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978).

UCC § 9-501 and Official Comment 6 indicate that a judgment lien acquired by a secured creditor creates no new interest in the creditor and that it is simply a continuation of the original interest created by the security agreement. *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978).

UCC § 9-501(1) plainly states that the remedies of proceeding on the debtor's note and the security agreement are cu-

mulative, and that each remedy remains in force, although efforts may have been made to collect the debt by the alternate means. *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978).

A secured party who is in possession of collateral that is not subject to the obligations imposed by UCC § 9-505(1) may seek judgment on the debt and forego recourse against the collateral, since under UCC § 9-501(1), the secured party's rights and remedies are cumulative. Except in the special case covered by UCC § 9-505(1), the Uniform Commercial Code does not require a secured party in possession of collateral to apply it to the reduction of the debt. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

In action by financier of motor-vehicle dealer to recover against dealer's statutory license bond for alleged conversion of vehicles sold by dealer, who was in default under security agreement with plaintiff, mere existence of plaintiff's right to take possession of vehicles, after dealer's default, under "self-help" repossession provisions of UCC § 9-503 was not sufficient possessory interest to sustain conversion claim where plaintiff, prior to making such claim against dealer's bond, had not attempted exercise its right to repossess vehicles. *Insurance Co. of N. Am. v. GECC*, 119 Ariz. 97, 579 P.2d 601 (Ct. App. 1978).

Creditor's remedies set forth in UCC § 9-501(1) are cumulative. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Even if guaranty agreement was secured by pledge of shares of stock, under UCC § 9-501 secured party was not required to exhaust security before seeking personal judgment against guarantor. *FDIC v. Bismarck Inv. Corp.*, 547 P.2d 212 (Utah 1976).

Where secured party pursued one of its cumulative rights and remedies under UCC § 9-501 by obtaining judgments against manufacturers of mobile homes on their repurchase agreements, obtaining of such judgments did not constitute satisfaction as to debtor particularly where it was undisputed that no payments had ever been received under such judgments. *Pruske v. National Bank of Commerce*, 533 S.W.2d 931 (Tex. Civ. App. 1976).

Secured party's remedies are cumulative under UCC § 9-501(1) and secured party is not required to elect one remedy to exclusion of another; therefore, secured party's decision not to execute upon judgment it held against debtor was within its statutory prerogatives and did not constitute breach of duty owed to guarantor. *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. 1976).

There is nothing in provisions of UCC § 9-501 which would alter rule that secured creditor, having obtained in personam judgment without asserting its security interest, was precluded, under principles of *res judicata*, from bringing subsequent action to enforce its security interest, and that secured creditor was likewise precluded from enforcing its security interest against trustee in bankruptcy. *In re Wilson*, 390 F. Supp. 1121 (D. Kan. 1975).

In declaratory judgment action brought by mobile home retailer against financing company, wherein financing company counterclaimed for possession of mobile homes covered by financing agreement and for amounts owed to financing company, financing company did not have to make an election of remedies; under UCC § 9-501(1), remedies of financing company, as secured party, were cumulative and it could have both possession and judgment for amounts owed to it. *Rose's Mobile Homes, Inc. v. Rex Fin. Corp.*, 383 F. Supp. 937 (W.D. Ark. 1974).

In action on two promissory notes secured by debtor's interest in leases of two vending machines, UCC § 9-501(1) entitled creditor to collect note without first seeking recourse against collateral, particularly where creditor did first reasonably try to repossess machines; third promissory note secured by note payable to debtor which was itself secured by fourth deed of trust on realty was also recoverable under UCC § 9-102(3) without first requiring creditor to foreclose trust deed. *Bank of Cal. v. Leone*, 37 Cal. App. 3d 444 (1st Dist. 1974).

Even though secured party elected to exercise its "self-held" rights and take possession of the security, it could still maintain an action on the debt secured until all of the security had been sold in a

commercially reasonable manner, under UCC § 9-501(1) provision for cumulative remedies. *Peoples Nat'l Bank v. Peterson*, 7 Wash. App. 196, 498 P.2d 884 (1972), *aff'd*, 82 Wash. 2d 822, 514 P.2d 159 (1973).

The remedies available to a secured party are permissive so that he may upon default sue for accelerated balance due without first retaking possession of the collateral and attempting to effect a sale in order to reduce the balance due by the debtor. *Consolidated Loan & Fin. Co. v. Howell*, 116 Ga. App. 308, 157 S.E.2d 328 (1967).

Where debtor in consideration of an accumulation of rent arrearages entered into a security agreement with his landlord creating a security interest in office, laboratory and plant equipment pursuant to the Uniform Commercial Code, and as evidence of his obligation debtor executed and delivered to the landlord a judgment note and judgment was entered thereon, and because of debtor's default, the landlord issued execution on the judgment and caused a levy to be made on all of debtor's property, including that covered by the security agreement, the landlord was not thereby deprived of the lien of his perfected secured claim, and was in a protected position in the debtor's voluntary bankruptcy proceeding. *In re Adrian Research & Chem. Co.*, 269 F.2d 734 (3d Cir. Pa. 1959).

8. —Deficiency judgment.

A secured party may judicially foreclose his security interest under UCC § 9-501(1) and also obtain a deficiency judgment. *Lew v. Goodfellow Chrysler-Plymouth, Inc.*, 6 Wash. App. 226, 492 P.2d 258 (1971).

Provision in conditional sales contract for right of deficiency after sale of security upon default, is valid. *Brunswick Corp. v. J & P, Inc.*, 296 F. Supp. 544 (W.D. Okla. 1969), *aff'd*, 424 F.2d 100 (10th Cir. Okla. 1970).

9. Acceleration of obligation.

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agree-

ments and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

Although notes which had been guaranteed by individual who subsequently became bankrupt, which were made payable to borrowers from bank, and which were held by bank as collateral security for loans made to borrowers, were not in default when bank claimed its right of set-off against bankrupt under UCC § 9-207(1), insolvency of guarantor triggered

bank's privilege, and possibly its duty, not only to file proof of claim in bankruptcy proceedings, but in alternative to assert any available set-off; initial immaturity of bankrupt guarantor's obligation upon collateral notes was not bar to bank's right of set-off. *In re Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

Where (1) lessor of computer, after purchasing it from manufacturer, leased it to lessee for 72 months at fixed rental per month, (2) lease provided that lessee could renew lease for one year for sum that equalled amount of one monthly rent payment and that at end of such renewal, lessee would become owner of computer, (3) lessee's obligation to pay rent was absolute and unconditional, and lease was not cancellable, (4) lessor disclaimed all warranties, express or implied, including implied warranties of merchantability and fitness for particular use, (5) computer did not function properly, and (6) lessee defended refusal to pay further rent on ground of failure of consideration, court held (1) that under UCC § 1-201(37), lease as a matter of law was actually intended as security agreement, especially since lessee could become owner of computer by paying amount that was equivalent to only one monthly rental, (2) that since lessor was to be viewed as conditional seller of computer, UCC § 9-206(2) applied with respect to effectiveness of lessor's disclaimer of warranties, (3) that warranty disclaimer in lease clearly satisfied requirements of UCC § 2-316(2) for exclusion or modification of warranties, (4) that lessee's remedy was solely against manufacturer of computer, instead of lessor, and (5) that under UCC § 9-501(1), lessor, with respect to lessee's failure to pay rent, had rights and remedies provided in security agreement between the parties, which agreement provided that on lessee's default and demand by lessor, lessee would pay amount equal to all unpaid rentals under the lease, plus interest at specified rate. *Citicorp Leasing, Inc. v. Allied Institutional Distribs., Inc.*, 454 F. Supp. 511 (W.D. Okla. 1977).

Where security agreement expressly provided that filing of petition in bankruptcy was event constituting default, holder of security interest had right upon

default to take control of all proceeds of collateral under UCC §§ 9-306 and 9-501 et seq., including right to receive and retain all subsequent lease payments. *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24 (E.D. Pa. 1976).

When the bank is the holder of a note of its depositor it may accelerate the note according to its terms and apply the depositor's account to the payment of the depositor's debt. *Olsen v. Valley Nat'l Bank*, 91 Ill. App. 2d 365, 234 N.E.2d 547 (2d Dist. 1968).

10. Sale of collateral by secured party.

Secured creditor failed to comply with Code by purchasing repossessed truck at its own private sale; held, debtors were not entitled to directed verdict in suit for damages resulting from such sale, where testimony of creditor's general manager and employee did not stand uncontroverted as to amount of damages. *Carter v. Ryburn Ford Sales, Inc.*, 248 Ark. 236, 451 S.W.2d 199 (1970), overruled on other grounds, *Frist State Bank v. Hallett*, 291 Ark. 27, 722 S.W.2d 555 (1987).

Section 9-504 of the Uniform Commercial Code, which provides that after the debtor defaults on a debt a secured party may sell, lease or otherwise dispose of any collateral in the manner provided in the statute and the debtor shall be liable for the deficiency, is applicable to determine the rights of the parties where plaintiff, a secured party which took possession of collateral upon the default of defendant debtors, received a letter from defendants, as maker and guarantors of the note, consenting to plaintiff's proposal to retake the collateral and, as to the inventory, consenting to plaintiff's suggested method of disposition, inasmuch as not only was it within their power to set the standards by which their rights and duties were to be measured (Uniform Commercial Code, § 9-501, subd [3]), but having accepted the terms in plaintiff's letter, defendants may not challenge the method of disposition or value placed on the inventory. Plaintiff failed to comply with the provisions of section 9-504 regarding fixtures where a letter from plaintiff contained no proposal for their disposition and defendants' consent extended no further than agreeing to possession, since section 9-504

requires that after taking, the collateral shall be disposed of in a commercially reasonable manner after notice to the debtor; however, this failure to comply does not deprive plaintiff of its deficiency judgment, but it must prove, at trial, the amount of the debt, the fair market value of the security and the resulting deficiency. *S.M. Flickinger Co. v. 18 Genesee Corp.*, 71 A.D.2d 382 (4th Dep't 1979).

Creditor's contention that sheriff's seizure of debtor's goods pursuant to default judgment, which was followed by a private, rather than a public, sale of the goods, was a permissible intermingling of the creditor's various remedies was not maintainable, since there is a crucial distinction between a creditor's repossession of collateral pursuant to the UCC, which is followed by the initiation of judicial proceedings, and a sheriff's seizure and private sale that is not in accordance with recognized judicial procedures. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Where there was no claim that collateral had not been sold in "commercially reasonable" manner as required by UCC § 9-504(3) and where collateral was sold for less than unpaid balance due on note, secured party was not required to account to debtor for surplus resulting from sale of collateral as provided by UCC § 9-504(2). *Panagiotis v. Plummer*, 5 Mass. App. Ct. 821, 362 N.E.2d 555 (1977).

Where renewal note provided for due date payment rather than installment payments as original note had specified and where bank continued to accept installment payments for three years after due date and did not present note for payment on due date or at any time thereafter, right of possession of collateral was in debtors absent demand by bank for payment of note or for surrender of collateral; a clause in a security instrument providing that a creditor may at any time he feels insecure treat debt as due and take and sell the property, does not authorize seizure and sale of property unless debtor is about to do, or has done, some act which tends to impair the security. *Nebraska State Bank v. Dudley*, 198 Neb. 132, 252 N.W.2d 277 (1977).

Where guaranty by its terms was absolute guaranty, obligations of guarantor

could be immediately enforced without necessity of action against principal obligor or collateral; thus, guarantor's argument that creditor failed to mitigate damages, based on allegation that creditor failed to dispose of collateral in "commercially reasonable" manner as required by UCC §§ 9-501 to 9-507, did not constitute valid defense to claim of creditor. *First Com. Corp. v. Geter*, 37 Colo. App. 391, 547 P.2d 1291 (1976).

Where secured party held corporate stock as security for payment of purchase price of stock and purchasers defaulted, and where manner in which stock was publicly auctioned, foreclosure of purchaser's interest in it and manner of giving notice of sale were reasonable, trial court erred in action by secured party in refusing to grant deficiency judgment and to foreclose mortgages given as supplementary security, notwithstanding secured party purchased stock at public auction. *Foster v. Knutson*, 84 Wash. 2d 538, 527 P.2d 1108 (1974).

Where testimony was in substantial agreement that there was no widespread market for used restaurant equipment, particularly kind specifically designed for use of particular franchise, and all parties testified that they knew of no standard price quotations for such equipment, such collateral was not of type that could have been validly purchased by secured party at private sale under UCC § 9-504(3) and such purchase by secured party violated UCC § 9-501 and 9-507. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Conditional vendee's ownership rights in collateral would not be cut off as result of failure to make payments and entry of default judgment, but default would merely satisfy condition precedent to conditional vendor's right to invoke certain Code remedies, including right to replevy goods and either keep them or dispose of them by sale; whether conditional vendor kept replevied goods as own or disposed of them by sale, adherence to applicable notice provisions would be required; only if conditional vendor ignored his rights against collateral and elected to proceed, like any creditor, on underlying debt, would subsequent disposal of collateral not be governed by Article 9 of Code.

Roebuck v. Walker-Thomas Furn. Co., 310 A.2d 845 (D.C. 1973).

11. —Notice of sale.

Collateral soybeans were not disposed of in commercially reasonable manner in light of the fact that, inter alia, no written notice of the proposed disposition was provided the debtor. *Jones v. United States ex rel. Commodity Credit Corp.*, 107 B.R. 888 (Bankr. N.D. Miss. 1989).

If "lease" between parties actually created security interest, debtor was entitled under UCC § 9-501(3)(b) and § 9-504(3) to assert, in action for deficiency judgment following sale of collateral, defense of lack of notice of such sale. *Burns v. Equilease Corp.*, 357 So. 2d 786 (Fla. App. 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Secured party who proposed after debtor's default to retain collateral in satisfaction of the obligation, but who failed to give debtor written notice of such proposal as required by UCC § 9-505(2), could not retain collateral since waiver of such notice is expressly prohibited by UCC § 9-501(3)(c). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Notice of public sale of corporate stock held as collateral for payment of promissory note, which was mailed six days before intended sale, was not commercially unreasonable where (1) standard for measuring commercial reasonableness agreed to by creditor and debtor—namely, five days—was satisfied, and (2) such standard was not manifestly unreasonable under UCC § 9-501(3), especially since debtor failed to present any substantial evidence that an additional day or two, or even a week, would have made any difference in his ability to pay. *Mullins v. Horne*, 120 Ariz. 587, 587 P.2d 773 (Ct. App. 1978).

Secured party may recover deficiency judgment despite failure to give notice of sale as provided by UCC § 9-501, where creditor proves the amount of the deficiency and that the fair value of the secu-

urity was less than the amount of the debt; it is only where the sale is conducted pursuant to code requirements that the amount received or bid at the sale is evidence of its value in an action for a deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

When debtor is in default under security agreement, secured party has rights and remedies that agreement provides for. Thus, on default, creditor under UCC § 9-501(1) may reduce his claim to judgment, foreclose, or otherwise enforce his security interest by any available judicial procedure. In addition, unless otherwise agreed, secured party on default has right under UCC § 9-503 to take possession of collateral. Accordingly, where debtor, whose payments on indebtedness were up-to-date, was in default because he had sold collateral covered by security agreement to third person without informing secured party or obtaining his consent, secured party could recover property in claim and delivery action, since neither UCC § 9-501(1) nor UCC § 9-503 makes an exception for technical defaults that do not cause financial injury to secured party. *Gorham v. Denha*, 77 Mich. App. 264, 258 N.W.2d 196 (1977).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months, was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of lessee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1), (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession

charges. *Avis Rent-A-Car Sys. v. Franklin*, 82 Misc. 2d 66 (1975).

New York courts would not permit the holder of a conditional automobile sales contract to secure a deficiency judgment, where the car had been repossessed and sold in Massachusetts without notice to the debtor in violation of the Massachusetts Uniform Commercial Code, although such a sale was permissible under the laws of the District of Columbia where the contract was originally made. *Associates Disct. Corp. v. Cary*, 47 Misc. 2d 369 (1965).

12. —Waiver of right to notice.

Procedures used by creditor to liquidate collateral soybeans were so devoid of any hint of commercial reasonableness that debtor could not be considered to have waived rights to protest disposition of collateral through language of farm storage notes and security agreements. *Jones v. United States ex rel. Commodity Credit Corp.*, 107 B.R. 888 (Bankr. N.D. Miss. 1989).

The provisions set forth in a printed form of assignment of a conditional sales contract waiving notice to the assignor who agreed to repurchase the contract in the event of default is only an attempted waiver, ineffective of the provisions of subd (3) of § 9-504. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom

to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

Secured party who proposed after debtor's default to retain collateral in satisfaction of the obligation, but who failed to give debtor written notice of such proposal as required by UCC § 9-505(2), could not retain collateral since waiver of such notice is expressly prohibited by UCC § 9-501(3)(c). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Loan contract which contained provision for waiver of notice of sale of repossessed collateral in violation of UCC § 9-501(3)(b) and § 9-504(3) was not completely void, but merely contained unenforceable provision, where defendant lender did not foreclose on or sell any property of plaintiff debtor and waiver provision was not in any way involved in the litigation between the parties. *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

UCC § 9-504(3), which provides that every aspect of disposition of collateral must be commercially reasonable and that reasonable notification of such disposition must be sent to debtor, cannot be waived, as is expressly declared by UCC 9-501(3)(b). *Savings Bank v. Booze*, 34 Conn. Supp. 632, 382 A.2d 226 (1977).

Proper interpretation of UCC § 9-501(3)(b), which is in accordance with policy of UCC § 9-504 to protect rights of

debtor, is that nonwaiver provision of UCC § 9-501(3) applies both before and after debtor's default. Thus, UCC § 9-501(3)(b) does not allow waiver by debtor of his right under UCC § 9-504(3) to reasonable notification of private sale of collateral after debtor's default on underlying obligation. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on "recognized market"; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to

stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

In action by bank seeking recovery under note and commercial equipment security agreement against guarantors, where bank sold collateral upon default prior to giving notice to guarantors and where guaranty agreement expressly waived notice of disposition of collateral, waiver clause was of no effect in that (1) guarantor is a debtor under definition of UCC § 9-105(1)(d), and (2) under UCC § 9-501(3), code provisions covering debtor's rights regarding disposition of collateral and redemption of collateral may not be waived. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Where bank agreed to advance funds for floor-plan financing of new and used cars to be sold by debtor, where bank repossessed debtor's automobile stock after default pursuant to UCC § 9-503 and where debtor signed default agreement nine days after repossession which waived all notice of terms, times, and places of sale of repossessed automobiles, waiver of notification of sale of collateral following default was valid under UCC § 9-501(3). *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976).

13. Unauthorized sale of collateral by debtor.

Where (1) secured party, on debtor's default in making payments on car, obtained document from debtor in which debtor waived notice of secured party's intended sale of car, (2) secured party, on October 12, 1976, sent letter to debtor by certified mail advising debtor that he could redeem car before such sale, (3) on learning that letter had not been received by debtor, secured party sent debtor second letter on October 19, 1976, which justified debtor's belief that he had until October 29, 1976 to redeem car, and (4) secured party sold car on October 25,

1976, court held (1) that UCC § 9-501(3)(b) prohibited waiver of notice to debtor, which is required by UCC § 9-504(3), of intended sale of car, (2) that even if it could be assumed, despite prohibition contained in UCC § 9-501(3)(b), that debtor had waived his right to such notice, secured party's attempted sending of notice to debtor by certified mail on October 12, 1976 operated as an abandonment of such waiver, (3) that such abandonment was reinforced by secured party's second notice to debtor on October 19, 1976, and (4) that debtor had right to rely on statements in second notice that he could redeem car until October 29, 1976. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Where a debtor sells collateral subject to a perfected security interest, the secured party may proceed (1) against the debtor (a) to collect the debt or (b) assert his rights to any identifiable proceeds in the hands of the debtor; or (2) against the purchaser by (a) repossession of the purchased goods in person or by an action of replevin or (b) by an action of trespass for conversion of the collateral. Once the purchaser has resold the collateral, the secured party has no contract right of action against the purchaser, either for the original debt or for the proceeds of the sale. *Beneficial Fin. Co. v. Colonial Trading Co.*, 43 Pa. D. & C.2d 131 (1967).

14. Foreclosure procedures under state law.

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such

security agreements and to owe creditor over \$27 million in principal debt and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

In Texas, if a personal judgment against the debtor is obtained on the underlying debt, the secured party may enforce such judgment against the collateral by a writ of execution, and a judicial sale pursuant to such execution is a foreclosure of the security interest by "judicial procedure" within the meaning of UCC § 9-501(1). *Garza v. Allied Fin. Co.*, 566 S.W.2d 57 (Tex. Civ. App. 1978).

Under UCC § 9-501(1), as explained in Official Comment 6, a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure outside Art 9 that state law may provide. The first sentence of UCC § 9-501(5) makes clear that any judgment lien that the secured party may acquire against the collateral is a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore

said to relate back to the date of perfection of the security interest. The second sentence of UCC § 9-501(5) makes clear that a judicial sale following judgment, execution, and levy is one of the methods of foreclosure contemplated by UCC § 9-501(1). Such a sale is governed by other law and not by Art 9, and the restrictions that Art 9 imposes on the right of a secured party to buy in the collateral at a sale under UCC § 9-504 do not apply. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

15. Proceedings involving both real and personal property.

Under UCC § 9-501(1), as explained in Official Comment 6, a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure outside Art 9 that state law may provide. The first sentence of UCC § 9-501(5) makes clear that any judgment lien that the secured party may acquire against the collateral is a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore said to relate back to the date of perfection of the security interest. The second sentence of UCC § 9-501(5) makes clear that a judicial sale following judgment, execution, and levy is one of the methods of foreclosure contemplated by UCC § 9-501(1). Such a sale is governed by other law and not by Art 9, and the restrictions that Art 9 imposes on the right of a secured party to buy in the collateral at a sale under UCC § 9-504 do not apply. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Where security agreement covered both real and personal property and plaintiff elected to proceed against both, plaintiff's rights and remedies would be determined according to law of foreclosure of interests in real property, and under UCC § 9-501(4), provisions of UCC Art 9 did not apply. *State Bank v. Woolsey*, 565 P.2d 413 (Utah 1977).

Where bar business was sold by means of two contracts, one involving sale of land and building in which business was conducted and the other involving sale of business itself, bar inventory, and liquor

license, and where the personal property sold was covered by security agreement which provided that in event of buyer's default on either contract, buyer would reassign liquor license to seller, such security agreement provision constituted a mutual default clause that was clearly authorized by UCC § 9-501(1). *McBride v. Arends*, 79 Mich. App. 440, 263 N.W.2d 5 (1977).

Where promissory note was secured by deed of trust on real property and separate security agreement covering personal property, where makers defaulted on promissory note and where creditor brought suit to foreclose deed of trust and security interest, although trial court was correct in limiting creditor's recovery on foreclosure to amount of judgment only, court should have granted creditor's prayer for immediate possession of chattels and authorized creditor to proceed under provisions of UCC §§ 9-501 et seq. *Alexander Dawson, Inc. v. Sage Creek Canyon Co.*, 37 Colo. App. 339, 546 P.2d 969 (1976).

Where creditor has both real and personal property security, UCC § 9-501 specifies that upon default if creditor proceeds as to both real and personal property security, he must do so according to rights and remedies accorded real property security and not pursuant to UCC, but, although § 9-501(4) is silent on point, such creditor can elect to proceed solely as to personal property under UCC. *Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329 (1974).

Code section requiring secured party to give reasonable notification to debtor of its intention to dispose collateral is made inoperative by Code § 9-501(4) with respect to water stock foreclosed as part of real estate security. *Kinoshita v. North Denver Bank*, 181 Colo. 183, 508 P.2d 1264 (1973).

16. Priorities among competing creditors.

Garnishment proceeding involving priorities between creditors as to funds in hands of clerk of public sale of debtor's property; held, trial judge was correct in ruling that prior judgment creditor, as assignee, was entitled to funds in dispute

as against garnishor. *Rural Gas, Inc. v. Shepek*, 205 Kan. 397, 469 P.2d 341 (1970).

17. Waivers of rights or remedies.

Under UCC § 9-501(3)(a), debtor's right to surplus under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), in the case of a transfer for security as opposed to a sale, cannot be waived by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), aff'd, 602 F.2d 538 (3d Cir. Pa. 1979).

Although UCC § 9-501(3)(d) provides that the debtor's right to redeem may not be varied or waived before default, the language "unless otherwise agreed in writing after default" in UCC § 9-506 does permit the debtor, after default, to waive or vary his right to redeem by an agreement in writing. *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880 (Ala. 1978).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Under the Uniform Commercial Code, a secured creditor need not “elect” his choice of remedies. Instead, he may pursue either those methods of collection that are afforded by the code or those methods that are otherwise available through judicial processes. Moreover, by effectuating the latter course of action, the creditor does not relinquish any rights obtained by virtue of his security interest. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Amended pledge agreement that purported to authorize secured party to dispose of debtors’ paintings, held as collateral, for any price or prices unilaterally decided on by secured party was not violative of UCC § 9-501 and was not therefore void and unenforceable since § 9-501 relates only to defaults; although debtors may have been in default under agreement prior to amended pledge agreement and might thereby have had valid defense had action been brought based on that default, debtors destroyed any previous defense when they executed amended pledge agreement. *Spillers v. Five Points Guar. Bank*, 335 So. 2d 851 (Fla. App. 1976).

Where bank agreed to advance funds for

floor-plan financing of new and used cars to be sold by debtor, where bank repossessed debtor’s automobile stock after default pursuant to UCC § 9-503 and where debtor signed default agreement nine days after repossession which waived all notice of terms, times, and places of sale of repossessed automobiles, waiver of notification of sale of collateral following default was valid under UCC § 9-501(3). *Teeter Motor Co. v. First Nat’l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976).

Secured party who purchased collateral at private sale failed to comply with UCC § 9-504(3) and was not entitled to deficiency judgment against debtors where collateral consisted of fixtures used in restaurant business and, thus, was not collateral of type customarily sold in recognized market or type which was subject of widely or regularly distributed standard price quotations; furthermore, language of security agreement, which provided that secured party could purchase collateral at private sale, constituted antecedent waiver of provisions of UCC § 9-504(3), in violation of UCC § 9-501(3) and was, therefore, contrary to public policy and void. *Barber v. LeRoy*, 40 Cal. App. 3d 336 (2d Dist. 1974).

RESEARCH REFERENCES

ALR. Title and interest of parties. 10 A.L.R.2d 758.

Purchase by pledgee of subject of pledge. 37 A.L.R.2d 1381.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 556, 572.

Instruction to jury; taking of property by debtor in violation of creditor’s rights under security agreement as conversion, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:185.

Default; rights and remedies of secured party; where security interest covers both real and personal property, 6 Am. Jur. Pl & Pr Forms (Rev ed), Secured Transactions, Form 9:701.

5A Am. Jur. Pl & Pr Forms (Rev), Chat-tel Mortgages, Forms 51 et seq. (default; enforcement of security interest).

Default; rights and remedies of secured

party, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:681-9:685.

Default; rights and remedies of debtor; proceeds from sale of collateral securing guaranteed note properly applied to other indebtedness of borrower, 6 Am. Jur. Pl & Pr Forms, Secured Transactions, Form 9:793.

CJS. 79 C.J.S., Secured Transactions §§ 144 et seq.

72 C.J.S., Pledges §§ 49 et seq., 63.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

The recent erosion of the secured creditor’s rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-602. Waiver and variance of rights and duties.

Except as otherwise provided in Section 75-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

- (1) Section 75-9-207(b)(4)(C), which deals with use and operation of the collateral by the secured party;
- (2) Section 75-9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;
- (3) Section 75-9-607(c), which deals with collection and enforcement of collateral;
- (4) Sections 75-9-608(a) and 75-9-615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;
- (5) Sections 75-9-608(a) and 75-9-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral;
- (6) Section 75-9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;
- (7) Sections 75-9-610(b), 75-9-611, 75-9-613, and 75-9-614, which deal with disposition of collateral;
- (8) Section 75-9-615(f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;
- (9) Section 75-9-616, which deals with explanation of the calculation of a surplus or deficiency;
- (10) Sections 75-9-620, 75-9-621, and 75-9-622, which deal with acceptance of collateral in satisfaction of obligation;
- (11) Section 75-9-623, which deals with redemption of collateral;
- (12) Section 75-9-624, which deals with permissible waivers; and
- (13) Sections 75-9-625 and 75-9-626, which deal with the secured party's liability for failure to comply with this article.

SOURCES: Derived from former 1972 Code § 75-9-501 [Codes, 1942, § 41A:9-501; Laws, 1966, ch. 316, § 9-501; Laws, 1977, ch. 452, § 32, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Attachment in chancery, see §§ 11-31-1 et seq.

Attachment at law, see §§ 11-33-1 et seq.

Executions, see §§ 13-3-111 et seq.

Variations of provisions of this Code by agreement, see § 75-1-102(3).

Collection and enforcement by secured party after default, see § 75-9-607.

Procedures after default: liability for deficiency and right to surplus, see § 75-9-608.

Disposition of collateral after default, see § 75-9-610.

Notification of proposal to accept collateral, see § 75-9-621.

Determination of whether conduct was commercially reasonable, see § 75-9-627.

Right to redeem collateral, see § 75-9-623.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-501(3).

6. Waiver of right to notice.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-501(3).

6. Waiver of right to notice.

Procedures used by creditor to liquidate collateral soybeans were so devoid of any hint of commercial reasonableness that debtor could not be considered to have waived rights to protest disposition of collateral through language of farm storage notes and security agreements. *Jones v. United States ex rel. Commodity Credit Corp.*, 107 B.R. 888 (Bankr. N.D. Miss. 1989).

The provisions set forth in a printed form of assignment of a conditional sales contract waiving notice to the assignor who agreed to repurchase the contract in the event of default is only an attempted waiver, ineffective of the provisions of subd (3) of § 9-504. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did

not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

Secured party who proposed after debtor's default to retain collateral in satisfaction of the obligation, but who failed to give debtor written notice of such proposal as required by UCC § 9-505(2), could not retain collateral since waiver of such notice is expressly prohibited by UCC § 9-501(3)(c). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Loan contract which contained provision for waiver of notice of sale of repossessed collateral in violation of UCC § 9-501(3)(b) and § 9-504(3) was not completely void, but merely contained unenforceable provision, where defendant lender did not foreclose on or sell any property of plaintiff debtor and waiver provision was not in any way involved in the litigation between the parties. *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

In action by bank seeking recovery under note and commercial equipment security agreement against guarantors, where bank sold collateral upon default prior to giving notice to guarantors and where guaranty agreement expressly waived notice of disposition of collateral, waiver clause was of no effect in that (1) guarantor is a debtor under definition of UCC § 9-105(1)(d), and (2) under UCC § 9-

501(3), code provisions covering debtor's rights regarding disposition of collateral and redemption of collateral may not be waived. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

UCC § 9-504(3), which provides that every aspect of disposition of collateral must be commercially reasonable and that reasonable notification of such disposition must be sent to debtor, cannot be waived, as is expressly declared by UCC 9-501(3)(b). *Savings Bank v. Booze*, 34 Conn. Supp. 632, 382 A.2d 226 (1977).

Proper interpretation of UCC § 9-501(3)(b), which is in accordance with policy of UCC § 9-504 to protect rights of debtor, is that nonwaiver provision of

UCC § 9-501(3) applies both before and after debtor's default. Thus, UCC § 9-501(3)(b) does not allow waiver by debtor of his right under UCC § 9-504(3) to reasonable notification of private sale of collateral after debtor's default on underlying obligation. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on "recognized market"; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Where bank agreed to advance funds for floor-plan financing of new and used cars to be sold by debtor, where bank repossessed debtor's automobile stock after default pursuant to UCC § 9-503 and where debtor signed default agreement nine days after repossession which waived all notice of terms, times, and places of sale of repossessed automobiles, waiver of notification of sale of collateral following default was valid under UCC § 9-501(3). *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976).

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Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 556, 572.

Instruction to jury; taking of property by debtor in violation of creditor's rights

under security agreement as conversion, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:185.

Default; rights and remedies of secured party; where security interest covers both real and personal property, 6 Am. Jur. Pl & Pr Forms (Rev ed), Secured Transactions, Form 9:701.

5A Am. Jur. Pl & Pr Forms (Rev), Chat-tel Mortgages, Forms 51 et seq. (default; enforcement of security interest).

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Default; rights and remedies of debtor; proceeds from sale of collateral securing

guaranteed note properly applied to other indebtedness of borrower, 6 Am. Jur. Pl & Pr Forms, Secured Transactions, Form 9:793.

CJS. 79 C.J.S., Secured Transactions §§ 144 et seq.

72 C.J.S., Pledges §§ 49 et seq., 63.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

The recent erosion of the secured creditor's rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-603. Agreement on standards concerning rights and duties.

(a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in Section 75-9-602 if the standards are not manifestly unreasonable.

(b) Subsection (a) does not apply to the duty under Section 75-9-609 to refrain from breaching the peace.

SOURCES: Derived from former 1972 Code § 75-9-501 [Codes, 1942, § 41A:9-501; Laws, 1966, ch. 316, § 9-501; Laws, 1977, ch. 452, § 32, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-604. Procedure if security agreement covers real property or fixtures.

(a) If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) Subject to subsection (c), if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) Under this part; or

(2) In accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

SOURCES: Derived from former 1972 Code §§ 75-9-501 [Codes, 1942, § 41A:9-501; Laws, 1966, ch. 316, § 9-501; Laws, 1977, ch. 452, § 32, eff from and after April 1, 1978] and 75-9-313 [Codes, 1942, § 41A:9-313; Laws, 1966, ch. 316, § 9-313; Laws, 1968, ch. 488, § 1; Laws, 1977, ch. 452, § 22; Laws, 1992, ch. 303, § 1, eff from and after July 1, 1992] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-313(8).

6. Priority as to conflicting interests in fixtures.
7. Priority as to lien creditors.
8. Removal of collateral.

III. Under former § 75-9-501(4).

9. Proceedings involving both real and personal property.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-313(8).

6. Priority as to conflicting interests in fixtures.

Hydraulic lifts installed at gas station prior to lease were fixtures within UCC § 9-313 and alleged lessor which had not filed lease could not prevail as to the lifts over execution levy of trustee in bankruptcy who had no notice of lessor's claimed interest or over purchaser of gas station at bankruptcy sale. *Leawood Nat'l Bank v. City Nat'l Bank & Trust Co.*, 474 S.W.2d 641 (Mo. Ct. App. 1971).

A bank's first mortgage had priority over a security interest arising from the construction of a swimming pool below the surface of the ground covered by the bank's first mortgage, where such pool

had become a fixture prior to the advancement of money by the bank claiming the security interest. *State Bank v. Kahn*, 58 Misc. 2d 655 (1969).

The holder of a chattel mortgage covering after-acquired property who established his security interest by properly filing financing statements takes priority over holder of previously executed conditional sales contract covering the same personal property and fixtures. *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

7. Priority as to lien creditors.

In action by supplier of air conditioning equipment for diner, to foreclose mechanic's lien and to collect on check issued for cost of air conditioning equipment on which payment had been stopped, diner was real property within meaning of state lien law, notwithstanding that owner of diner and manufacturer-seller of diner had entered into security agreement, pursuant to UCC § 9-313, that diner would remain personal property for financing purposes. *Fedders Cent. Air Conditioning Corp. v. Karpinecz & Sons*, 83 Misc. 2d 720 (1975).

Historical society's unperfected security interest in station used by debtor railroad was not enforceable against creditor with perfected security interest arising out of recorded mortgage, nor against debtor's trustee in bankruptcy who had status of

lien creditor. In re New Hope & I.R.R., 353 F. Supp. 608 (E.D. Pa. 1973).

8. Removal of collateral.

What Code provision relating to security interest in fixtures is aiming at is prevention of substantial destruction of building, such as would be case for instance, if new exterior surface had been installed in place of old one; provision may not prevent removal of aluminum siding which has been added to house, provided house will remain substantially in original state after removal. Dry Dock Sav. Bank v. De Georgio, 61 Misc. 2d 224 (1969) (court recognized that this may turn out to be somewhat Pyrrhic victory, giving lienor pile of dubious scrap not worth labor of getting it off house, repairing nail holes, etc. Whether removal of aluminum siding hurts mortgagee without doing lienor any corresponding good was held to be something for parties to consider and beyond control of court).

Where personal property cannot be removed without causing substantial damage to the freehold the after-acquired property clause of the prior mortgage is superior to the purchase money security interest of the seller of such personal property. Feldzamen v. Paulro Properties, Inc., 4 U.C.C. Rep. Serv. 524 (1967, NY Sup).

III. Under former § 75-9-501(4).

9. Proceedings involving both real and personal property.

Under UCC § 9-501(1), as explained in Official Comment 6, a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure outside Art 9 that state law may provide. The first sentence of UCC § 9-501(5) makes clear that any judgment lien that the secured party may acquire against the collateral is a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore said to relate back to the date of perfection of the security interest. The second sentence of UCC § 9-501(5) makes clear that a judicial sale following judgment, execution, and levy is one of the methods of

foreclosure contemplated by UCC § 9-501(1). Such a sale is governed by other law and not by Art 9, and the restrictions that Art 9 imposes on the right of a secured party to buy in the collateral at a sale under UCC § 9-504 do not apply. Bilar, Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977).

Where security agreement covered both real and personal property and plaintiff elected to proceed against both, plaintiff's rights and remedies would be determined according to law of foreclosure of interests in real property, and under UCC § 9-501(4), provisions of UCC Art 9 did not apply. State Bank v. Woolsey, 565 P.2d 413 (Utah 1977).

Where bar business was sold by means of two contracts, one involving sale of land and building in which business was conducted and the other involving sale of business itself, bar inventory, and liquor license, and where the personal property sold was covered by security agreement which provided that in event of buyer's default on either contract, buyer would reassign liquor license to seller, such security agreement provision constituted a mutual default clause that was clearly authorized by UCC § 9-501(1). McBride v. Arends, 79 Mich. App. 440, 263 N.W.2d 5 (1977).

Where promissory note was secured by deed of trust on real property and separate security agreement covering personal property, where makers defaulted on promissory note and where creditor brought suit to foreclose deed of trust and security interest, although trial court was correct in limiting creditor's recovery on foreclosure to amount of judgment only, court should have granted creditor's prayer for immediate possession of chattels and authorized creditor to proceed under provisions of UCC §§ 9-501 et seq. Alexander Dawson, Inc. v. Sage Creek Canyon Co., 37 Colo. App. 339, 546 P.2d 969 (1976).

Where creditor has both real and personal property security, UCC § 9-501 specifies that upon default if creditor proceeds as to both real and personal property security, he must do so according to rights and remedies accorded real property security and not pursuant to UCC,

but, although § 9-501(4) is silent on point, such creditor can elect to proceed solely as to personal property under UCC. *Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329 (1974).

Code section requiring secured party to give reasonable notification to debtor of its

intention to dispose collateral is made inoperative by Code § 9-501(4) with respect to water stock foreclosed as part of real estate security. *Kinoshita v. North Denver Bank*, 181 Colo. 183, 508 P.2d 1264 (1973).

§ 75-9-605. Unknown debtor or secondary obligor.

A secured party does not owe a duty based on its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

- (A) That the person is a debtor or obligor;
- (B) The identity of the person; and
- (C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

- (A) That the person is a debtor; and
- (B) The identity of the person.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-606. Time of default for agricultural lien.

For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-607. Collection and enforcement by secured party.

(a) If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under Section 75-9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under Section 75-9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under Section 75-9-104(a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) A default has occurred; and

(B) The secured party is entitled to enforce the mortgage nonjudicially.

(c) A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

SOURCES: Derived from former 1972 Code § 75-9-502 [Codes, 1942, § 41A:9-502; Laws, 1966, ch. 316, § 9-502; Laws, 1977, ch. 452, § 33, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Rights after default, see § 75-9-601.

Procedures after default: liability for deficiency and right to surplus, see § 75-9-608.

Disposition of collateral after default, see § 75-9-610.

Notification of proposal to accept collateral, see § 75-9-621.

Determination of whether conduct was commercially reasonable, see § 75-9-627.

Right to redeem collateral, see § 75-9-623.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-502.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-502.

6. In general.

Where, under franchising agreement between manufacturer of industrial equipment and manufacturer's franchisee, reserve account was created to aid

franchisee in financing sales to customers, court held (1) that if no fiduciary relationship existed between parties, manufacturer was required to handle funds in reserve account in "commercially reasonable manner" required by UCC § 9-502(2); (2) that if fiduciary relationship did exist between parties and if other factors necessary to create constructive trust were present, manufacturer, as trustee of such trust, was required to handle trust (reserve-account funds) in "prudent and proper manner"; (3) that if manufacturer was not trustee and "commercially reasonable manner" standard applied to case, under UCC § 9-507(2),

element of price-with regard to sales of repossessed equipment involved in suit—was one factor in determining commercial reasonableness of such sales, although it was not determinative factor; and (4) that whether franchisee had given manufacturer notice of defects in equipment supplied by manufacturer, as required by UCC § 2-607(3)(a), was jury question. *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386 (5th Cir. 1982).

In action by retail furniture dealer which had entered into agreement with defendant financier, under which plaintiff transferred its accounts receivable to defendant in exchange for, being provided with funds in specified proportion to accounts defendant accepted from plaintiff, to recover sums held in reserve account established by parties' agreement, (1) plaintiff's accounts receivable were not sold to defendant, but were transferred to it as collateral security within meaning of UCC § 9-502(2) in exchange for line of credit defendant extended to plaintiff; (2) as a result, under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), defendant was required to account for, and to turn over to plaintiff, any surplus collected by defendant on the transferred accounts, and plaintiff in turn was liable for any deficiency on such accounts; and (3) surplus held by defendant on loan owed by plaintiff and deficiency on such loan were cross-obligations that must be set off against each other. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Under UCC § 9-501(3)(a), debtor's right to surplus under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), in the case of a transfer for security as opposed to a sale, cannot be waived by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

UCC § 9-502(2) only applies when secured party attempts to make collections on collateral, either after default or by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Where secured party had perfected security interest in all of debtor's present and future accounts and contract rights, including proceeds therefrom, where debtor obtained purchase orders for shoes from buyer and assigned purchase orders to export-import company, and where export-import company performed purchase orders and delivered shoes to buyer, account generated by export-import company's performance of debtor-buyer contract did not constitute "proceeds" of that contract within meaning of UCC § 9-306; thus, secured party did not have right to collect account from buyer under UCC § 9-502(1) but only had claim against export-import company for conversion of contract right, i. e., right to perform purchase orders. *American E. India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3d Cir. Pa. 1978).

Under UCC §§ 9-502 and 9-318(3), account debtor was under obligation to make payment to assignee to whom creditor had assigned all of its accounts receivable, instead of making payment directly to creditor, where assignee sent account debtor registered letter that notified debtor that assignee held security agreement with creditor covering all of creditor's accounts receivable and inventory and demanding payment of all monies due to creditor, notwithstanding that at time assignee sent its notice, account debtor's obligation to creditor was not "account" receivable of creditor, in that account debtor had not received creditor's performance which would obligate debtor to make payment. *Marine Nat'l Bank v. Airco, Inc.*, 389 F. Supp. 231 (W.D. Pa. 1975).

UCC § 9-502 relating to a secured party's collection rights applies only to those cases in which the security consists of intangibles, such as accounts or chattel paper, and not, as here, where the collateral is cattle. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

The legislative intent was to restrict the notice provision of UCC § 9-502(1) to those cases in which the security consists of intangibles, such as accounts or chattel paper; where security was not intangible

but cattle, protection of security interest in proceeds under UCC § 9-306(3)(a) is not waived by failure to meet notice requirements of UCC § 9-502(1). *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

In action by bank, as secured party, for deficiency judgment against bond dealer to whom bank had made various loans secured by bonds in which dealer dealt, bank's hasty action, when confronted with a classic "wash sale" or "kiting" situation engaged in by the dealer in a declining bond market, in liquidating bonds held by it as collateral did not violate UCC § 9-502(2), which requires secured party to proceed in commercially reasonable manner in enforcing its collection rights. *Bankers Trust Co. v. J.V. Dowler & Co.*, 62 A.D.2d 778 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 128, 417 N.Y.S.2d 47, 390 N.E.2d 766 (1979).

Plaintiff bank made loans to the defendant, a dealer in municipal bonds, secured by such bonds and a security agreement permitted plaintiff to sell the collateral without notice, if it deemed itself insecure. Plaintiff advanced moneys to defendant on the basis of 90% of the current market value of unsold municipal bonds held by defendant and 100% of the market value of bonds which had been sold. Defendant, caught in a depressed municipal bond market, entered into a suspect agreement with another bank whereby defendant sold bonds to this bank and agreed to repurchase them at \$1 a bond profit for the bank. Defendant informed plaintiff of the sale and received 100% financing on the bonds but plaintiff thereafter discovered the agreement between defendant and the other bank and gave defendant one day to cover the additional collateral which defendant was unable to do whereupon plaintiff sold the bonds it held as collateral which it clearly had the right to do considering the security agreement and the declining municipal bond market. *Bankers Trust Co. v. J.V. Dowler & Co.*, 62 A.D.2d 778 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 128, 417 N.Y.S.2d 47, 390 N.E.2d 766 (1979).

Bank, which as secured party attempted to collect sums due on account from debtor's shoe customers, was obligated under UCC § 9-502(2) to proceed in commercially reasonable manner and to act in good faith in its collection efforts. *Pedi Bares, Inc. v. First Nat'l Bank*, 223 Kan. 477, 575 P.2d 507 (1978).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

Where bank took possession of records of creditor's accounts receivable and where bank did not attempt to collect all accounts, but sent two letters on some of them and thereafter took no further action on any of accounts receivable, bank did not sustain burden of proof that it proceeded to liquidate accounts receivable in commercially reasonable manner as required by UCC § 9-502(2). *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). But see *Howard Kool Chevrolet v. Blomstedt*, 2 Neb. App. 493, 511 N.W.2d 222 (1994).

Where ex-wife gave bank promissory note secured by security deed on land and bill of sale to secure debt on mobile home, 17 months later bank transferred promissory note and security instruments to borrower's ex-husband without informing her as to transfer, on same day bank reacquired note and collateral securities when ex-husband assigned them to bank as security for present and future debts, ex-wife was informed no further payments were owed, ex-husband refinanced two previous loans by executing promissory note on which he subsequently defaulted, bank was entitled to recover unpaid balance on ex-wife's note through judicial sale of collateral given by ex-wife to secure note. *Peters v. Washington Loan & Banking Co.*, 133 Ga. App. 293, 211 S.E.2d 148 (1974).

RESEARCH REFERENCES

ALR. Right of holder of commercial paper to interest or finance charges applicable to period after acceleration of maturity of obligation because of debtor's default. 63 A.L.R.3d 10.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 584-589.

Collateral not owned by debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:81.

Default; collection rights, 6 Am. Jur. Pl

& Pr Forms (Rev), Secured Transactions, Forms 9:711-9:716.

Collection rights of secured party, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3741 et seq.

Law Reviews. The recent erosion of the secured creditor's rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-608. Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.

(a) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 75-9-607 in the following order to:

(A) The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under paragraph (1)(C).

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under Section 75-9-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency.

SOURCES: Derived from former 1972 Code § 75-9-502 [Codes, 1942, § 41A:9-502; Laws, 1966, ch. 316, § 9-502; Laws, 1977, ch. 452, § 33, eff from and after

April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-502(2).

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

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6. In general.

Where, under franchising agreement between manufacturer of industrial equipment and manufacturer's franchisee, reserve account was created to aid franchisee in financing sales to customers, court held (1) that if no fiduciary relationship existed between parties, manufacturer was required to handle funds in reserve account in "commercially reasonable manner" required by UCC § 9-502(2); (2) that if fiduciary relationship did exist between parties and if other factors necessary to create constructive trust were present, manufacturer, as trustee of such trust, was required to handle trust (reserve-account funds) in "prudent and proper manner"; (3) that if manufacturer was not trustee and "commercially reasonable manner" standard applied to case, under UCC § 9-507(2), element of price-with regard to sales of repossessed equipment involved in suit was one factor in determining commercial reasonableness of such sales, although it was not determinative factor; and (4) that whether franchisee had given manufacturer notice of defects in equipment supplied by manufacturer, as required by UCC § 2-607(3)(a), was jury question. *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386 (5th Cir. 1982).

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to recover sums held in reserve account established by parties' agreement, (1) plaintiff's accounts receivable were not sold to defendant, but were transferred to it as collateral security within meaning of UCC § 9-502(2) in exchange for line of credit defendant extended to plaintiff; (2) as a result, under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), defendant was required to account for, and to turn over to plaintiff, any surplus collected by defendant on the transferred accounts, and plaintiff in turn was liable for any deficiency on such accounts; and (3) surplus held by defendant on loan owed by plaintiff and deficiency on such loan were cross-obligations that must be set off against each other. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

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UCC § 9-502(2) only applies when secured party attempts to make collections on collateral, either after default or by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

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thus, secured party did not have right to collect account from buyer under UCC § 9-502(1) but only had claim against export-import company for conversion of contract right, i. e., right to perform purchase orders. *American E. India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3d Cir. Pa. 1978).

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Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

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Under UCC §§ 9-502 and 9-318(3), account debtor was under obligation to make payment to assignee to whom creditor had assigned all of its accounts receivable, instead of making payment directly to creditor, where assignee sent account debtor registered letter that notified debtor that assignee held security agreement with creditor covering all of creditor's accounts receivable and inventory and demanding payment of all monies due to creditor, notwithstanding that at time assignee sent its notice, account debtor's obligation to creditor was not "account" receivable of creditor, in that account debtor had not received creditor's performance which would obligate debtor to make payment. *Marine Nat'l Bank v. Airco, Inc.*, 389 F. Supp. 231 (W.D. Pa. 1975).

Where ex-wife gave bank promissory note secured by security deed on land and

bill of sale to secure debt on mobile home, 17 months later bank transferred promissory note and security instruments to borrower's ex-husband without informing her as to transfer, on same day bank reacquired note and collateral securities when ex-husband assigned them to bank as security for present and future debts, ex-wife was informed no further payments were owed, ex-husband refinanced two previous loans by executing promissory note on which he subsequently defaulted, bank was entitled to recover unpaid balance on ex-wife's note through judicial sale of collateral given by ex-wife to secure note. *Peters v. Washington Loan & Banking Co.*, 133 Ga. App. 293, 211 S.E.2d 148 (1974).

UCC § 9-502 relating to a secured par-

ty's collection rights applies only to those cases in which the security consists of intangibles, such as accounts or chattel paper, and not, as here, where the collateral is cattle. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

The legislative intent was to restrict the notice provision of UCC § 9-502(1) to those cases in which the security consists of intangibles, such as accounts or chattel paper; where security was not intangible but cattle, protection of security interest in proceeds under UCC § 9-306(3)(a) is not waived by failure to meet notice requirements of UCC § 9-502(1). *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

RESEARCH REFERENCES

ALR. Right of holder of commercial paper to interest or finance charges applicable to period after acceleration of maturity of obligation because of debtor's default. 63 A.L.R.3d 10.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 584-589.

Collateral not owned by debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:81.

Default; collection rights, 6 Am. Jur. Pl

& Pr Forms (Rev), Secured Transactions, Forms 9:711-9:716.

Collection rights of secured party, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3741 et seq.

Law Reviews. The recent erosion of the secured creditor's rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-609. Secured party's right to take possession after default.

(a) After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 75-9-610.

(b) A secured party may proceed under subsection (a):

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

SOURCES: Derived from former 1972 Code § 75-9-503 [Codes, 1942, § 41A:9-503; Laws, 1966, ch. 316, § 9-503, *eff* March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, *eff* from and after January 1, 2002.

Cross References — Replevin, generally, see §§ 11-37-101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-503.

6. In general.
7. Self help repossession, generally.
8. —Constitutional issues.
9. —Constitutional issues; state action.
10. —Constitutional issues; denial of due process.
11. —Breach of peace.
12. —Conversion.
13. —Trespass and other criminal or tortious actions.
14. —Liability of secured party for tortious acts committed during repossession.
15. —Agreements as to notice prior to repossession.
16. —Right of secured party to repossession; particular applications.
17. Repossession by action, generally.
18. —Particular applications.
19. —Particular applications; after bankruptcy of debtor.
20. Obligation to assemble collateral or make it available.
21. Time and place of repossession.
22. Resale of collateral by secured party.
23. Sale of collateral by debtor or third party.
24. Priorities among creditors.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-503.

6. In general.

Where (1) seller sold portable building and air cooler to buyer for large down payment and small balance, which buyer allegedly failed to pay when it became due, and (2) seller repossessed the property, even though buyer and seller had not executed security agreement designating it as collateral for balance due, court held (1) that since property had been unconditionally delivered to buyer, buyer was entitled to retain possession thereof, even though he still owed part of purchase

price, and (2) that allegations of seller's motion for new trial did not establish that his repossession was justified, either at common law or under the Uniform Commercial Code (see UCC § 9-503). *Gardner v. Jones*, 570 S.W.2d 198 (Tex. Civ. App. 1978).

There is nothing unconscionable in a contract clause that authorizes repossession of a chattel on default. Indeed, UCC § 9-503 specifically authorizes such self-help remedy on condition that it is carried out without breach of the peace. Furthermore, an established course of dealing under which the debtor makes continual late payments and the secured party accepts them does not result in a waiver of the secured party's right to rely on a clause in the agreement that authorizes him to declare a default and to repossess the chattel. However, even though no outright waiver of the secured party's right to rely on such a clause occurs by a course of dealing involving the acceptance of late payments, if the secured party has not insisted on strict compliance in the past and has accepted late payments as a matter of course, he must, before he can validly rely on such a clause to declare a default and effect repossession, give notice to the debtor that strict compliance with the terms of the contract will henceforth be required to avoid repossession. *Nevada Nat'l Bank v. Huff*, 94 Nev. 506, 582 P.2d 364 (1978).

Seller with perfected security interest was entitled to immediate possession of collateral upon default, notwithstanding express right to immediate possession did not appear in default provisions of contract, since UCC § 9-503 grants that right to secured party upon buyer's default. *MGD Graphic Sys. v. New York Press Publishing Co.*, 52 A.D.2d 815 (1st Dep't 1976), aff'd, 42 N.Y.2d 1018, 398 N.Y.S.2d 657, 368 N.E.2d 835 (1977).

Where debtor failed to make five installment payments and secured party sent debtor written notice of default, where, under terms of installment sales agreement, debtor was in default ten days after

it received such notice, and where defendant had not paid arrearages in full when secured party elected to accelerate amount due on promissory note, debtor's subsequent effort to pay arrearages was insufficient to prevent default, since obligation then amounted to full unpaid balance of note, and was ineffective to cut off secured party's right to possession of equipment. *Honeywell Info. Sys. v. Demographic Sys.*, 396 F. Supp. 273 (S.D.N.Y. 1975).

Secured party did not have repossession right provided by UCC § 9-503 where collateral was subject to conditional sales contract governed by pre-code law and debtor's interest in collateral had been forfeited thereunder. *Barnett v. Everett Trust & Sav. Bank*, 13 Wash. App. 332, 534 P.2d 836 (1975).

Provision of motor vehicle retail installment sales act requiring, under certain circumstances, election between alternative remedies was in conflict with cumulative remedies provided in UCC §§ 9-503 and 9-504, and therefore, pursuant to UCC § 9-203(4), which provides that where there is any conflict between provisions of Article 9 of Uniform Commercial Code and provisions of motor vehicle retail installment sales act, provisions of latter statute shall apply, creditor with security interest in automobile was limited to election required by such statute where conditions precedent to applicability of statute had been met. *Chicago City Bank & Trust Co. v. Anderson*, 26 Ill. App. 3d 421, 325 N.E.2d 701 (1st Dist. 1975).

No repossession was involved under UCC § 9-503 where purchaser of automobile that was subject to security interest voluntarily brought it to repairman for repair work, repairman retained possession of auto pursuant to valid mechanic's lien acquired as result of its labor, and after purchaser defaulted in his payments to secured party, secured party assigned its interest to repairman; since there was no repossession, there was no occasion to consider whether UCC § 9-503 was unconstitutional. *Chrysler Credit Corp. v. Gillaspie*, 24 Ill. App. 3d 620, 321 N.E.2d 509 (1st Dist. 1974).

Repossession of mobile home in accordance with UCC § 9-503 and conditional

sales contract provision authorizing secured party's repossession upon default was not action "under color of state law." *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

In absence of provision in security agreement to contrary, secured party is granted right to take possession of property securing indebtedness upon default by mortgagor. *Kirkman v. North State Bank*, 476 S.W.2d 958 (Tex. Civ. App. 1972), ref. n.r.e (July 12, 1972).

Secured creditor under mortgage of motor vehicle is given, on default, statutory right to immediate possession of motor vehicle. *Platte Valley Bank v. Kracl*, 185 Neb. 168, 174 N.W.2d 724 (1970).

There is no authority to support the contention of judgment creditors holding liens subordinate to the lien of the holder of a perfected security interest in the debtor's inventory that the latter owes a duty to merchandise creditors to demand repayment and to foreclose on its lien at the first instance it believes, or has cause to believe, that the debtor cannot repay his loan, or risk losing its security if it fails to do so. *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821 (1967).

Upon default in payments due on the indebtedness secured by a perfected interest, the holder became entitled to immediate possession of the security with the right to sell the same. *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821 (1967).

Since the UCC has abolished the technical distinctions between the various security devices, the federal bankruptcy courts should no longer feel compelled to engage in the purely theoretical exercise of locating "title"; nor should considerations of where "title lies" influence the courts in the exercise of their equitable discretion in ruling upon a security holder's petition for reclamation of collateral. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

It does not matter whether the security agreement is in the form of a chattel mortgage or a conditional sales contract since the enactment of the UCC; for in either case the secured party has the right upon default to take possession of the collateral and to sell, lease or otherwise

dispose of it, applying the proceeds to the indebtedness. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

Federal law rather than state law would control an action based upon an alleged conversion by an auctioneer by sale at public auction of cattle against which the Farmers Home Administration had a recorded security agreement executed in its favor by the owner of the cattle. *United States v. Sommerville*, 324 F.2d 712 (3d Cir. Pa. 1963), cert. denied, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964).

Where the conditional buyer of an automobile breached one of the warranties contained in the security agreement by registering the vehicle in the name of a fictitious corporation, the buyer was in default and the holder of the security agreement had the right to immediate possession of the collateral. *Natick Trust Co. v. Bay State Truck Lease, Inc.*, 28 Mass. App. Dec. 60 (1963).

7. Self help repossession, generally.

A creditor must do more than cause a mere breach of peace in conducting self help repossession before he or she can be held liable for punitive damages; a breach of peace may be deemed tortious-for which the creditor will be held liable for actual and consequential damages-but the tortiousness of the conduct must rise to a heightened level before punitive damages may be imposed. *Ivy v. GMAC*, 612 So. 2d 1108 (Miss. 1992).

There is nothing unconscionable in a contract clause that authorizes repossession of a chattel on default. Indeed, UCC § 9-503 specifically authorizes such self-help remedy on condition that it is carried out without breach of the peace. Furthermore, an established course of dealing under which the debtor makes continual late payments and the secured party accepts them does not result in a waiver of the secured party's rights to repossess. *Gardner v. Jones*, 570 S.W.2d 198 (Tex. Civ. App. 1978).

On debtor's breach of terms and conditions of inventory-financing security agreement with secured party, secured party was entitled to resort to remedies provided both by security agreement and by UCC § 9-503, which gives secured

party right to take possession of collateral after default. *GECC v. Marcella's Appliances Sales & Servs., Inc.*, 66 A.D.2d 927 (3d Dep't 1978).

Where note was accompanied by security agreement which granted security interest in all property of debtor in secured party's possession as security for all obligations owed by debtor, secured party, on default on note, clearly had right under UCC § 9-503 to take possession of all property of debtor in secured party's possession, and exercise of this right did not result in conversion of such collateral by secured party, since situation did not involve applicability of UCC § 9-505(1), which provides that if debtor has paid 60 percent of loan, secured party who has taken possession of collateral consisting of consumer goods must dispose of such collateral within 90 days or face liability for conversion. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

Provision of instalment contract granting secured party right to repossess secured automobile without judicial process was permitted by Code § 9-503 and was not unconscionable. *Frost v. Mohawk Nat'l Bank*, 74 Misc. 2d 912 (1973).

No commencement of judicial action is required prior to taking possession of security under UCC § 9-503. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

Upon default, secured party had right to take possession of collateral in accordance with UCC § 9-503, without making demand upon defaulting debtors. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

8. —Constitutional issues.

Self-help repossession provided for by UCC § 9-503 is constitutional. *Eustice v. Brazille*, 567 P.2d 92 (Okla. 1977).

Self-help repossession procedures of UCC § 9-503 are constitutional. *Hunt v. Marine Midland Bank-Central*, 80 Misc. 2d 329 (1974).

UCC § 9-503 was not unconstitutional as applied to repossession and sale of combine where creditor gave debtor every opportunity to avoid default and resorted to repossession only after debtor refused to make any effort to pay and was in-

formed that creditor had choice but to repossess combine. *John Deere Co. v. Catalano*, 186 Colo. 101, 525 P.2d 1153 (1974).

9. —Constitutional issues; state action.

Fact that Arizona's enactment of UCC §§ 9-503 and 9-504 greatly changed Arizona law, rather than merely codifying a preexisting common-law right, did not, in absence of further indications of government involvement, establish state action in violation of debtor's right under Fourteenth Amendment to procedural due process, so as to give debtor, whose collateral was sold by creditor at foreclosure sale, right of action under 42 USCS § 1983. *Bosse v. Crowell, Collier & MacMillan*, 565 F.2d 602 (9th Cir. Ariz. 1977).

Washington UCC § 9-503, authorizing self-help repossession of collateral without notice or judicial hearing, does not deprive persons of property without due process of law in contravention of either Fourteenth Amendment to United States Constitution or Article 1, section 3 of constitution of state of Washington, since state officials are not involved in the private remedy that is allowed to creditor by debtor under the self-help statute. *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977).

Repossession of automobile by secured party pursuant to provisions of UCC § 9-503 did not violate due process clause of Fourteenth Amendment; no state action was involved in repossession since it was accomplished pursuant to provisions in contract authorizing such remedy in case of default and this type of creditor's self-help was recognized long before UCC § 9-503 was enacted. *Speigle v. Chrysler Credit Corp.*, 56 Ala. App. 469, 323 So. 2d 360 (Civ. App. 1975), cert. denied, 295 Ala. 420, 323 So. 2d 367 (1975).

UCC § 9-503, authorizing self-help repossession of collateral without notice or hearing, does not violate due process; enactment of UCC § 9-503 was not, in and of itself, sufficient state action to compel invocation of Fourteenth Amendment due process clause. *Faircloth v. Old Nat'l Bank*, 86 Wash. 2d 1, 541 P.2d 362 (1975),

appeal dismissed, 425 U.S. 986, 96 S. Ct. 2195, 48 L. Ed. 2d 812 (1976).

Self-help repossession provisions of UCC § 9-503 do not violate constitutional due process because no state action is present when state passes law which: (a) does not change common law or previously codified statutory law; (b) does not significantly encourage and involve state in private action; and (c) does not involve any state official in prejudgment self-help repossession of collateral. *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 542 P.2d 1042 (1975), appeal dismissed, 425 U.S. 928, 96 S. Ct. 1656, 48 L. Ed. 2d 170 (1976).

Self-help repossession provision, UCC § 9-503, does not involve state action and is not, therefore, subject to due process requirements of state and federal constitutions. Furthermore, where debtor failed to prove that he was damaged in any respect as result of repossession of collateral, it was unnecessary to consider contention that manner in which part of equipment was repossessed constituted breach of peace and that repossession was therefore unauthorized under UCC § 9-503. *Borg-Warner Acceptance Corp. v. Scott*, 86 Wash. 2d 276, 543 P.2d 638 (1975).

Self-help repossession pursuant to UCC § 9-503 does not constitute state action within meaning of due process clause of Fourteenth Amendment. *Hill v. Michigan Nat'l Bank*, 58 Mich. App. 430, 228 N.W.2d 407 (1975).

UCC § 9-503 was free from Federal Due Process scrutiny in civil rights action for lack of requisite state action, despite evidence to indicate that in repossessing plaintiff's washing machine, repossessors broke into his home. *Calderon v. United Furn. Co.*, 505 F.2d 950 (5th Cir. Tex. 1974).

Repossession of automobile pursuant to UCC § 9-503 was not action under color of state law where enactment of UCC provision merely codified pre-existing state law. *Gary v. Darnell*, 505 F.2d 741 (6th Cir. Ky. 1974).

Automobile dealer's peaceful repossession of automobile from purchaser after default in conditional sales contract under provisions of UCC § 9-503 did not consti-

tute action under color of state law within meaning of Civil Rights Act nor state action within meaning of due process clause of Fourteenth Amendment. *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. Tenn. 1974).

Where contract contains default and repossession provisions, private repossession is not infused with "state action" merely because state enacts §§ 9-503 and 9-504 of UCC. *Gibbs v. Titelman*, 502 F.2d 1107, 29 A.L.R. Fed. 406 (3d Cir. Pa. 1974), cert. denied, 419 U.S. 1039, 95 S. Ct. 526, 42 L. Ed. 2d 316 (1974).

Self-help repossession under UCC §§ 9-503 and 9-504 does not constitute sufficient state involvement to invoke jurisdiction of federal courts. *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1006, 95 S. Ct. 328, 42 L. Ed. 2d 283 (1974).

Self-help repossession under UCC § 9-503 does not constitute sufficient state action to confer federal jurisdiction. *James v. Pinnix*, 495 F.2d 206 (5th Cir. 1974).

Code §§ 9-503 and 9-504 providing for summary repossession and sale of collateral do not involve sufficient state action or conduct under color of state law required to establish a federal cause of action. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. Cal. 1973), cert. denied, 419 U.S. 1006, 95 S. Ct. 325, 42 L. Ed. 2d 282 (1974).

Repossession and sale of collateral by secured party under UCC §§ 9-503 and 9-504 without giving debtor notice and hearing did not constitute state action and, hence, could not form basis for relief under Federal Civil Rights Act. *Teitelbaum v. Scranton Nat'l Bank*, 384 F. Supp. 1139, 34 A.L.R. Fed. 535 (M.D. Pa. 1974).

Action of secured party in repossessing collateral in accord with UCC § 9-503 was not action "under color of law" as that phrase is used in Civil Rights Act. *McDuffy v. Worthmore Furn., Inc.*, 380 F. Supp. 257 (E.D. Va. 1974).

The self-help repossession statutes do not constitute sufficient state action to confer federal jurisdiction over action seeking declaration of unconstitutionality.

Thompson v. Keesee, 375 F. Supp. 195 (E.D. Ky. 1974).

Enactment of UCC §§ 9-503 and 9-504, providing for self-help repossession of mortgaged vehicle, did not constitute "state action" for purpose of determining constitutionality of procedure; nor did repossession of vehicle deprive buyer of any right of possession or ownership where buyer had voluntarily abandoned those rights by returning vehicle and rejecting it for alleged defect under UCC § 2-602. *Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1 (W.D. Mo. 1973), aff'd, 496 F.2d 16 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1006, 95 S. Ct. 328, 42 L. Ed. 2d 283 (1974).

Self-help repossession authorized by UCC §§ 9-503 and 9-504 did not violate Fourteenth Amendment, where repossession did not constitute state action, self-help provisions were sufficiently fair to all parties, and purchasers agreed to remedy of repossession in contract which was one consideration for contract to finance purchase. *Cook v. Lilly*, 158 W. Va. 99, 208 S.E.2d 784 (1974).

Repossession of automobile by secured creditor after default in payment, pursuant to UCC § 9-503, was private contractual matter rather than state action and thus did not violate debtor's Fourteenth Amendment rights. *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1, 75 A.L.R.3d 1030 (1974).

Bank's repossession of automobile under conditional sales contract on debtor's failure to make required payment did not constitute action by state depriving debtor of property without due process of law in violation of Fourteenth Amendment. Though UCC § 9-503 recognizes right of self-help repossession of collateral, state personnel are not involved in act, and right of repossession is not creature of statute, but existed at common law. Moreover, right to deficiency judgment set forth in UCC § 9-504 is distinct from process of seizure, and its allowance does not affect nature of repossession procedure as one continuing from common law. *Kipp v. Cozens*, 40 Cal. App. 3d 709 (1st Dist. 1974).

Defendant, who repossessed collateral covered by security agreement pursuant to UCC § 9-503, did not act under color of

state law for purposes of invoking Civil Rights Act, nor was there “state action” within meaning of Fourteenth Amendment. *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973).

State, by adopting UCC §§ 9-503 and 9-504, could not be held responsible for creating conditions which resulted in standardized contracts that are typically used in credit industry and provide for self-help repossession without notice or hearing prior to seizure; hence defendants’ self-help repossession and sale of plaintiff’s furniture, household goods and automobile pursuant to terms of agreement making said items security for repayment of loan, as authorized by UCC, were not actions “under color of state law” sufficient to give federal court jurisdiction under Civil Rights Act. *Johnson v. Associates Fin., Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973).

The finance companies that repossessed automobiles under UCC § 9-503 without notice to debtors and without judicial process acted under color of state law; hence, federal district court had jurisdiction over actions by debtors under 42 USC § 1983, claiming that self-help repossession under UCC § 9-503 violated due process guarantee of Fourteenth Amendment. *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973).

Self-help repossession by creditor does not constitute state action for purposes of invoking due process clause of Fourteenth Amendment, and UCC § 9-503, which authorizes secured party to take possession of collateral after default, but only if it can be attained peacefully without breach of peace, when considered in connection with UCC §§ 9-504 through 9-507, which contain provisions designed to insure that creditor cannot exercise his contract rights in manner which enables him to profit from buyer’s default, is not an unconstitutional deprivation of property without due process of law in violation of Fourteenth Amendment. *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973).

Code § 9-503 authorizing self-help repossession does not constitute creation by State of new right in secured creditor which he would not theretofore have had

but for statute, but rather it is merely statutory recognition of century-old law that if parties so provide in their agreement, secured party may privately retake his collateral upon default by private means and without necessity of judicial action, provided he can do so peacefully; accordingly private repossession pursuant to contract, in accordance with Code § 9-503, is not conduct “impregnated with a governmental character” to such extent as would cause it to fall under Fourteenth Amendment coverage of state action. *Giglio v. Bank of Del.*, 307 A.2d 816 (Del. Ch. 1973).

State authorization, under UCC § 9-503, of private self-help repossessions is not sufficient state involvement in private acts of individuals to constitute “state action” necessary to invoke Due Process Clause of Fourteenth Amendment. *Brown v. United States Nat’l Bank*, 265 Or. 234, 509 P.2d 442 (1973).

Since state’s only real “involvement” in private repossessions by secured parties is statutory authorization of those repossessions, existence of UCC § 9-503 and other related statutes does not sufficiently involve state in acts of secured parties or their acts to constitute action “under color of” state law, within meaning of federal statutes. *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972).

Federal District Court had no jurisdiction over action seeking declaration of unconstitutionality of UCC § 9-503, which permits peaceful repossession of secured goods without judicial process, since repossession by individual defendants represented no state action. *Pease v. Havelock Nat’l Bank*, 351 F. Supp. 118 (D. Neb. 1972).

Code § 9-503 which allows a secured party to take possession of collateral without judicial intervention if it can be done without breach of peace did not violate Fourteenth Amendment, where operation of statute did not require aid, assistance, or interaction of any state agent, body, organization, or function. *Greene v. First Nat’l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972).

Codification of practice of self-help recaption by enactment of Code § 9-503 cannot so give that practice color of state

law as to take it out of private area and make it subject to Fourteenth Amendment. *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (Ch. Div. 1972).

10. —Constitutional issues; denial of due process.

Self-help repossession permitted by UCC § 9-503 is not tantamount to taking property without due process of law, since protection of procedural due process does not extend beyond perimeter of state action into realm of private parties' contractual remedies that are enforced without the persons or powers of government. *McComb Equip. Co. v. Cooper*, 370 So. 2d 1367 (Miss. 1979).

Statutory replevin remedy (UCC § 9-503) does not deny due process. *Lawson v. Mantell*, 62 Misc. 2d 307 (1969).

11. —Breach of peace.

Possibility existed that debtor could recover, under Mississippi law, on breach of peace claim against collection agency that repossessed his vehicle; therefore, agency failed to prove that debtor fraudulently joined it in removed state action against lender and agency to destroy diversity jurisdiction, as required to establish federal jurisdiction. *Branson v. Nissan Motor Acceptance Corp.*, 963 F. Supp. 595 (S.D. Miss. 1996).

Simply going upon the private driveway of the debtor and taking possession of the secured collateral, without more, does not constitute a breach of the peace; this, however, is the limit of the right to repossess without instituting legal action. *Hester v. Bandy*, 627 So. 2d 833 (Miss. 1993).

A debtor's attempt to physically resist a reposessor's attempted repossession of a van from the debtor's residence in the early morning hours terminated the reposessor's right to continue because in doing so he caused a breach of the peace. *Hester v. Bandy*, 627 So. 2d 833 (Miss. 1993).

A "breach of peace" occurred when a creditor's agents repossessed a delinquent debtor's van pursuant to § 75-9-503 where the debtor saw the creditor's agents towing away the van, the debtor chased the agents in his truck, and the debtor

"slammed on his brakes" when he pulled in front of the tow truck, resulting in a "slight" collision when the tow truck was unable to stop; however, the creditor's agents' conduct in repossessing the van did not rise to the requisite heightened level of tortiousness to warrant imposition of punitive damages. *Ivy v. GMAC*, 612 So. 2d 1108 (Miss. 1992).

Unauthorized entry onto driveway of debtor's residence by secured creditor to remove or repossess vehicle did not constitute breach of peace, despite argument that entering private driveway to repossess vehicle without use of force is breach of peace because it constitutes trespass. *Butler v. Ford Motor Credit Co.*, 829 F.2d 568 (5th Cir. 1987).

Contention that secured party committed breach of the peace under UCC § 9-503 in effecting self-help repossession of collateral could not be sustained where plaintiff's own testimony showed that force, fraud, or breach of the peace did not occur, and that repossession took place at night when debtor was asleep and unaware of its occurrence. *Robertson v. Union Planters Nat'l Bank*, 561 S.W.2d 901 (Tex. Civ. App. 1978), *ref. n.r.e.* (July 5, 1978).

Where seller on buyer's default (1) repossessed buyer's car, which buyer had driven to seller's place of business, by "blocking it in" with another vehicle over buyer's unequivocal protest, and (2) informed buyer that he could just "walk his ass home," jury could properly find that seller's combined acts of "blocking in" car and speaking to buyer in offensive and insulting language were sufficiently provocative of violence to constitute a breach of the peace under UCC § 9-503. *Deavers v. Standridge*, 144 Ga. App. 673, 242 S.E.2d 331 (1978).

Fact that, in repossessing automobile, credit company's employee may have lied to service station operator who had possession of automobile, telling him that owner of car had consented to repossession, did not constitute "breach of the peace" making its repossession wrongful. *Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. Ala. 1977).

To determine whether breach of the peace within meaning of UCC § 9-503 has

occurred, courts will mainly inquire (1) whether there was entry by creditor on debtor's premises, and (2) whether debtor or one acting on his behalf consented to the entry and repossession. Ordinarily, the creditor may not enter the debtor's home or garage without permission, but he can probably take a car from the debtor's driveway without incurring liability. The debtor's consent, freely given, legitimates any entry; conversely, the debtor's physical objection bars repossession, even from a public street. *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750 (Fla. App. 1977).

Under UCC § 9-503, creditor's limited privilege to enter on debtor's land must be exercised without any breach of the peace. *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750 (Fla. App. 1977).

There was no breach of peace where secured creditor banks, with aid of armed guards, seized aircraft belonging to reorganization debtor. *In re Flying W Airways, Inc.*, 341 F. Supp. 26 (E.D. Pa. 1972).

Seller's action to repossess caterpillar tractor; buyer cross-complained for wrongful and malicious repossession; held, evidence supported finding that unauthorized action of sheriff in aiding plaintiff in repossession amounted to constructive force, intimidation, and oppression, constituting breach of peace and conversion. *Stone Mach. Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970), review denied, 77 Wash. 2d 962 (1970).

"Breach of peace" as that term is used in Ohio version of UCC § 9-503 includes acts fraught with likelihood of violence, i.e. no assault need have been committed, but there was breach of peace when citizen was "surrounded" by two men and placed in fear of "being beaten." *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970).

The words "if this can be done without breach of the peace" contemplated that the breach of peace there referred to must involve some violence, or at least the threat of violence; it was error for the trial court to charge a constructive breach of the peace where the defendants had repossessed a tractor without any violence or threat of violence. *Harris Truck & Trailer Sales v. Foote*, 58 Tenn. App. 710, 436 S.W.2d 460 (1968).

Employees of bank which held security agreement authorizing it in the event of a default to enter the premises where any of the collateral might be located and take and carry away the same with or without legal process, were not guilty of a "breach of the peace" when they entered the debtor's premises after default through use of a key which was unauthorizedly obtained. *Cherno v. Bank of Babylon*, 54 Misc. 2d 277 (1967), aff'd, 29 A.D.2d 767, 288 N.Y.S.2d 862 (2 Dep't 1968).

12. —Conversion.

In action by financier of motor-vehicle dealer to recover against dealer's statutory license bond for alleged conversion of vehicles sold by dealer, who was in default under security agreement with plaintiff, mere existence of plaintiff's right to take possession of vehicles, after dealer's default, under "self-help" repossession provisions of UCC § 9-503 was not sufficient possessory interest to sustain conversion claim where plaintiff, prior to making such claim against dealer's bond, had not attempted exercise its right to repossess vehicles. *Citicorp Homeowners, Inc. v. Western Sur. Co.*, 131 Ariz. 334, 641 P.2d 248 (Ct. App. 1981).

Since UCC § 9-503 gives a secured party the right to immediate possession of the collateral on the debtor's default, allegations by the secured party of an immediate possessory right to the collateral, and of acts by the defendant that interfere with such right, are sufficient to state a cause of action in conversion against the defendant. *Kramer v. McDonald's Sys.*, 61 Ill. App. 3d 947, 378 N.E.2d 522 (1st Dist. 1978), aff'd, 77 Ill. 2d 323, 33 Ill. Dec. 115, 396 N.E.2d 504 (1979).

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient

funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral-in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion-the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unautho-

rized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

In action for conversion of debtor's unencumbered personal property in trunk of car repossessed by creditor under self-help provisions of UCC § 9-503, award of actual damages from which no appeal was taken was affirmed, but award of punitive damages was disapproved where evidence did not show, either directly or circumstantially, that creditor or any of its employees had acted with wilful, deliberate, or evil intent to deprive debtor maliciously, fraudulently, or oppressively of his personal property. *Mangrum v. Ford Motor Credit Co.*, 577 P.2d 1304 (Okla. 1978).

In buyer's suit against credit company and automobile dealer for conversion of car, where (1) buyer, after entering into retail installment contract for purchase of used car from dealer and after dealer's assignment of contract to credit company, failed to make numerous payments on time, (2) credit company never refused any of buyer's late payments, (3) credit company repossessed car when buyer was still in default, and (4) credit company, allegedly before such repossession, sent buyer letter, which buyer denied receiving, that informed buyer that in the future, credit company would insist on strict compliance with contract, court held (1) that credit company's conduct in allowing buyer to fall behind in payments without repossessing car and in consistently accepting buyer's late payments was sufficient to justify jury finding that credit company had waived its right to repossess under UCC § 9-503, (2) that credit company's letter to buyer shortly before car's repossession could not be said, as matter of law, to be defense to credit company's waiver of its right to repossess in view of buyer's testimony that he never received such letter, and (3) that because credit company's waiver of its right to repossess

had resulted from its conduct and was not a voluntary relinquishment of such right, evidence did not show wanton and malicious intent of credit company to injure buyer that would justify award of punitive damages, especially since car's repossession had been accomplished under belief that credit company still had right to repossess. *Ford Motor Credit Co. v. Washington*, 573 S.W.2d 616 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Mar. 28, 1979).

Where (1) seller sold portable building and air cooler to buyer for large down payment and small balance, which buyer allegedly failed to pay when it became due, and (2) seller repossessed the property, even though buyer and seller had not executed security agreement designating it as collateral for balance due, court held (1) that since property had been unconditionally delivered to buyer, buyer was entitled to retain possession thereof, even though he still owed part of purchase price, and (2) that allegations of seller's motion for new trial did not establish that his repossession was justified, either at common law or under the Uniform Commercial Code (see UCC § 9-503). *Gardner v. Jones*, 570 S.W.2d 198 (Tex. Civ. App. 1978).

Livestock auctioneer was not liable in conversion to secured creditor for selling, on behalf of debtor, cattle belonging to debtor which were part of collateral for creditor's loan where (1) debtor's security agreement with creditor did not prohibit sale of collateral or provide that such sale would constitute default by debtor on underlying obligation, and (2) debtor at time of sale was not in default on underlying obligation, so as to entitle creditor under UCC § 9-503 to immediate possession of cattle and thus give creditor basis for suit in conversion. *Production Credit Ass'n v. Equity Coop Livestock Sales Ass'n*, 82 Wis. 2d 5, 261 N.W.2d 127 (1978).

Where note was accompanied by security agreement which granted security interest in all property of debtor in secured party's possession as security for all obligations owed by debtor, secured party, on default on note, clearly had right under UCC § 9-503 to take possession of all property of debtor in secured party's possession, and exercise of this right did not

result in conversion of such collateral by secured party, since situation did not involve applicability of UCC § 9-505(1), which provides that if debtor has paid 60 percent of loan, secured party who has taken possession of collateral consisting of consumer goods must dispose of such collateral within 90 days or face liability for conversion. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

UCC § 9-503 cannot be interpreted as permitting self-help repossession of collateral by trick or fraud without knowledge of debtor. Thus, where secured party, on pretext of examining debtor's record of payments under automobile installment-purchase contract to determine whether debtor was in default, induced debtor to drive purchased vehicle to secured party's office and there repossessed vehicle while debtor was engaged in disputing alleged default, secured party was guilty of self-help repossession effected by fraud and trickery without debtor's consent, and such conduct rendered secured party liable for conversion of repossessed vehicle. *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557 (Ala. 1977).

Where security agreement executed by buyer of automobile provided that seller, in event of buyer's default on note given to finance vehicle, could without process take immediate possession of vehicle and any property therein and hold such property for buyer at buyer's risk without liability on part of seller, seller on effecting self-help repossession of vehicle under UCC § 9-503 could lawfully take possession of personal property of buyer inside vehicle, even though seller had no security interest in such property, but failure to return property on buyer's demand would constitute unlawful exercise of dominion over property. Hence, in conversion action for seller's alleged refusal to return such property to buyer until entire balance due on note was paid, (1) question whether property had in fact been unlawfully detained should have been determined by trial of such issue; (2) trial court's granting of summary judgment on issue in favor of seller was erroneous and would be reversed; and (3) seller's present willingness to return property to buyer did not remove tortious nature of originally unau-

thorized exercise of dominion over property. *Jones v. GMAC*, 565 P.2d 9 (Okla. 1977).

Since secured creditor had right under UCC § 9-503 to repossess collateral upon default, repossession by agent of creditor was not conversion, even though repossession was without notice, and private sale of repossessed collateral was not conversion, even though sale was not commercially reasonable as required by UCC § 9-504. *Thurmond v. Elliott Fin. Co.*, 141 Ga. App. 574, 234 S.E.2d 153 (1977).

Where security agreement providing that creditor would have security interest in inventory of retailer and in proceeds of sale of each item of inventory did not impose duty upon retailer to pay over to creditor specific proceeds of sale of each item covered by agreement, but merely provided that upon sale or other disposition of any item of inventory, retailer was obligated to immediately pay amounts due to creditor, there was no specific fund from which payment had to be made, and thus corporate officer's commingling of proceeds of sales with other funds was not conversion of proceeds. *Independence Dist. Corp. v. Bressner*, 47 A.D.2d 756 (2d Dep't 1975).

In action by debtor against creditor and others to recover damages for conversion of his automobile, creditor lawfully enforced security interest in automobile under UCC § 9-503 where, although court did not expressly find that debtor was in default, it did find that creditor's "repossession" was in accordance with agreement of parties, which finding was supported by creditor's testimony, and contained implied finding that debt was overdue and that debtor was in default when creditor sold car. *Clark v. Vaughn*, 504 S.W.2d 550 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 17, 1974).

Where secured party repossessed automobile in accord with terms of security agreement and provisions of UCC § 9-503 without use of force or fraud, debtor was not entitled under theory of unlawful conversion to retain venue of suit in county where automobile was repossessed under provisions of venue statute relating to crime or trespass. *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853 (Tex. Civ. App. 1973), writ dismissed w.o.j., (Apr. 3, 1974).

Secured party not liable in conversion for repossession of trucks upon buyer's default; notice of repossession not required under retail instalment contract or Code. *Weaver v. O'Meara Motor Co.*, 452 P.2d 87 (Alaska 1969).

Where purchaser of tractor under conditional sales agreement delivered it to dealer for repairs at a time when he was in default in making monthly payments, and had previously advised assignee of contract he did not intend to make additional payments until allegedly defective machine was replaced, assignee was not guilty of conversion for instructing dealer to hold tractor in its name, or for subsequently reselling it. *N.J. Scott Excavating & Wreckings, Inc. v. Rosencrantz*, 107 N.H. 422, 223 A.2d 522 (1966).

13. —Trespass and other criminal or tortious actions.

Unauthorized entry onto driveway of debtor's residence by secured creditor to remove or repossess vehicle did not constitute breach of peace, despite argument that entering private driveway to repossess vehicle without use of force is breach of peace because it constitutes trespass. *Butler v. Ford Motor Credit Co.*, 829 F.2d 568 (5th Cir. 1987).

Unless parties otherwise agree, when vehicle is covered by valid security agreement which provides that creditor has right to repossess vehicle on debtor's default, repossession of vehicle under UCC § 9-503 from debtor's unenclosed carport without threats or use of force is not trespass, regardless of whether the security agreement specifically authorizes entry on debtor's premises. *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750 (Fla. App. 1977).

Self-help repossession of pick-up truck by secured party pursuant to terms of security agreement after debtor defaulted did not constitute trespass or wrongful conversion, notwithstanding debtor refused to deliver possession of vehicle to secured party, where debtor was not present at time of repossession and no issue of resistance or lack of resistance to repossession was raised; furthermore, self-help repossession provision of UCC § 9-503 does not violate due process clause of Fourteenth Amendment to the

United States Constitution nor does it violate state constitutional provision that “No person shall be deprived of life, liberty, or property, without due process of law,” since there was no state action involved. *Helfinstine v. Martin*, 561 P.2d 951 (Okla. 1977).

Bank and its agent were not liable to debtor for conversion based on theory that they committed “unlawful trespass” when agent repossessed debtor’s automobile while it was parked in driveway of debtor’s home since conditional sales agreement authorized secured party to “enter any premises where motor vehicle may be found and take possession of it,” and where there was no entry into home or other closed building on debtor’s premises. *Raffa v. Dania Bank*, 321 So. 2d 83 (Fla. App. 1975).

In trespass action against credit corporation which had purchased conditional sales contract for automobile, evidence failed to support essential element of action of trespass, that of use of force, actual or constructive, where credit company repossessed automobile covertly and without breach of peace nor intimidation of plaintiff-vendee, because, under UCC § 9-503, right to repossess personal property by secured party is statutory, absent contrary agreement. *Ford Motor Credit Co. v. Ditton*, 52 Ala. App. 555, 295 So. 2d 408 (1974), cert. denied, 292 Ala. 423, 295 So. 2d 412 (1974).

Where buyer of automobile failed to pay cash balance due thereon and seller repossessed automobile, seller was not guilty of grand larceny; among other things, seller’s action was expressly authorized by UCC § 9-503. *White v. State*, 51 Ala. App. 638, 288 So. 2d 175 (Crim. App. 1974).

Under UCC § 9-503 creditor may not undertake self-help repossession which results in breach of peace and, thus, trial court erred in dismissing complaint that alleged wrongful trespass by secured party in order to repossess automobile. *Thrasher v. First Nat’l Bank*, 288 So. 2d 288 (Fla. App. 1974).

Bank employees, entering debtor’s premises with unauthorized key and taking collateral without legal process pursuant to Code § 9-503, had not converted collateral, since they had not breached the

peace; however, court did not condone this self-help where bank had knowledge of pending legal proceedings and suggested that it might subject bank to contempt charges. *Cherno v. Bank of Babylon*, 54 Misc. 2d 277 (1967), aff’d, 29 A.D.2d 767, 288 N.Y.S.2d 862 (2 Dep’t 1968).

14. —Liability of secured party for tortious acts committed during repossession.

Once having chosen remedy of peaceable repossession, instituting party subjects itself to any liability due to negligence arising in course of enforcement, which would not be case had party chosen legal remedy of replevin whereby legal officer would be primarily liable for damages arising from his actions. *Southern Indus. Sav. Bank v. Greene*, 224 So. 2d 416 (Fla. App. 1969), cert. denied, 232 So. 2d 181 (Fla. 1969).

While secured party, through its agents, had right to peacefully enter premises and obtain its property, secured party would be responsible for any tortious acts committed during repossession. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969).

15. —Agreements as to notice prior to repossession.

Borrower’s contention that security agreement required bank to give it adequate notice of acceleration of balance due on note before repossessing collateral could not be sustained where such agreement expressly provided that on default of borrower, bank at its option could declare all of borrower’s obligations to be immediately due and payable without notice or demand, and that creditor should then have remedies of secured party under Uniform Commercial Code, including right to repossess collateral under UCC § 9-503. *Ace Parts & Distrib., Inc. v. First Nat’l Bank*, 146 Ga. App. 4, 245 S.E.2d 314 (1978).

Where security agreement with respect to default provided (1) that seller should have right to declare all amounts due or to become due under the agreement to be immediately due and payable, and (2) that seller should also have all rights and remedies of a secured party under the Uniform Commercial Code, including right to

repossess collateral, court held that seller had not contracted away its right under law (see UCC § 9-503) to repossess collateral without first giving notice to debtor. *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978).

Where automobile lessor, without prior demand or notice, repossessed vehicle from lessee's garage for lessee's failure to make several monthly payments during lessee's ten-month possession of vehicle, and where lessor accepted some monthly payments from lessee after accrual of such arrearage, trial court erred in granting summary judgment to lessor for lessee's breach of lease agreement, since issue of fact existed as to whether lessee was entitled to notice of repossession or demand for payment of arrearage prior to repossession. Although UCC § 9-503, in allowing self-help repossession, does not impose requirement of notice or demand, creditor may nevertheless impose such requirement on himself by conduct which gives debtor impression that late payments will be accepted or that arrearage need not be paid immediately. *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 235 S.E.2d 752 (1977), opinion after remand from supreme court, 144 Ga. App. 312, 241 S.E.2d 31 (1977).

Notwithstanding UCC § 9-503 permits self-help repossession, repossession of automobile by dealer and finance company without prior notice constituted a tort where contract contained acceleration clause which, by judicial construction, required affirmative action by dealer and finance company in notifying purchaser of their election to declare contract in default and to accelerate it to maturity. *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 224 S.E.2d 437 (1976).

16. —Right of secured party to repossession; particular applications.

In buyer's suit against credit company and automobile dealer for conversion of car, where (1) buyer, after entering into retail installment contract for purchase of used car from dealer and after dealer's assignment of contract to credit company, failed to make numerous payments on time, (2) credit company never refused any of buyer's late payments, (3) credit

company repossessed car when buyer was still in default, and (4) credit company, allegedly before such repossession, sent buyer letter, which buyer denied receiving, that informed buyer that in the future, credit company would insist on strict compliance with contract, court held (1) that credit company's conduct in allowing buyer to fall behind in payments without repossessing car and in consistently accepting buyer's late payments was sufficient to justify jury finding that credit company had waived its right to repossess under UCC § 9-503, (2) that credit company's letter to buyer shortly before car's repossession could not be said, as matter of law, to be defense to credit company's waiver of its right to repossess in view of buyer's testimony that he never received such letter, and (3) that because credit company's waiver of its right to repossess had resulted from its conduct and was not a voluntary relinquishment of such right, evidence did not show wanton and malicious intent of credit company to injure buyer that would justify award of punitive damages, especially since car's repossession had been accomplished under belief that credit company still had right to repossess. *Ford Motor Credit Co. v. Washington*, 573 S.W.2d 616 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Mar. 28, 1979).

Under UCC § 9-503, the secured party does not have to secure the debtor's permission in order to take possession of the collateral without judicial process. Furthermore, removal from the premises of collateral that consists of heavy equipment is not required, since under UCC § 9-503, the secured party may render such equipment unusable or dispose of it. *Elliot v. Villa Park Trust & Sav. Bank*, 63 Ill. App. 3d 714, 380 N.E.2d 507 (Dist. 1978).

Repossession of automobile was not wrongful under UCC § 9-503, which permits secured party to take possession of collateral on debtor's default, where (1) retail installment contract between buyer and seller provided that time was of the essence of the contract, that in event of buyer's default, seller had right to declare all amounts due or to become due to be immediately due and payable, that seller had right under Uniform Commercial

Code to repossess vehicle, and that seller's waiver of any default should not be deemed to be a waiver of any other default, and (2) at time of seller's repossession of vehicle, buyer was in default on an installment payment. Moreover, the mere fact, if true, that several hours before repossession took place, buyer, without knowledge of or notice to seller, sent seller check by certified mail did not constitute payment of delinquent installment, since check was not received until after seller had repossessed vehicle. *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (E.D. Mo. 1978).

Where evidence in conversion action showed that plaintiff purchased motorcycle under instalment contract giving seller security interest in vehicle; that seller assigned contract for value and with full recourse to bank, which filed contract of record on July 31, 1972; that purchaser defaulted in making payments in October, 1973; that seller paid balance due on vehicle to bank and bank orally reassigned contract to seller on April 4, 1974; that seller then paid third party's bill for repairs to vehicle and repossessed vehicle from such party; and that purchaser instituted action against seller after failing to repay seller for amounts paid out on vehicle, (1) seller on buying contract back from bank became secured party entitled to self-help repossession under UCC § 9-503; (2) seller did not convert vehicle by paying repair bill and repossessing vehicle, since such action was authorized by debtor-redemption provisions of UCC § 9-506; and (3) conversion claim based on seller's alleged violation of UCC § 9-505 also failed because it was not made until final argument at trial. *Eustice v. Brazille*, 567 P.2d 92 (Okla. 1977).

Where (1) Navajo Indian purchased pick-up truck from Arizona seller whose place of business was located outside boundaries of Navajo Reservation, (2) purchase price of truck was financed by installment-sale security agreement which provided that validity and construction of agreement would be governed by Arizona law and that secured party should have all rights and remedies for default provided by Arizona Uniform Commercial Code, and (3) seller, on buyer's default in

making payments, effected self-help repossession of truck pursuant to UCC § 9-503 within boundaries of Navajo Reservation and without breach of the peace, under UCC § 1-105(1) parties by their contractual choice of Arizona law to govern transaction excluded any possibility that transaction would be affected by provisions of Navajo Tribal Code which prescribed civil penalty for repossessing personal property of Navajo Indians on land subject to jurisdiction of Navajo Tribe where such repossession was not effected with written consent of purchaser at time of repossession. *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

In action to recover on delinquent promissory note which was secured by security interest in personal property, secured creditor was entitled under UCC § 9-503 to possession of the property and could have properly obtained possession if it could have done so without breaching the peace. *Bank of Pleasant Grove v. Johnson*, 552 P.2d 1276 (Utah 1976).

In action against finance company for conversion and invasion of privacy, arising out of repossession of debtor's automobile, trial court did not err in instructing jury that repossession was not wrongful where debtor admitted she was one payment behind at time automobile was repossessed. *Windsor v. GMAC*, 295 Ala. 80, 323 So. 2d 350 (1975).

Secured parties who repossessed collateral, restaurant equipment, by breaking lock on door of drive-in were within their rights under UCC § 9-503 where collateral was kept in premises leased from secured parties, rent had been in default for one month, demand for payment of rent had been made in that month, debtors had been given notice that lease was terminated according to its terms, lease provided that upon breach lessors would have right to reenter and take possession of premises without judicial proceedings, and there could be no breach of peace by party forcibly entering premises to which he is entitled to possession. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Where the chattel mortgage on an airplane provided that, in event of default,

the mortgagee or his assignee may exercise the option of entering upon the premises where the plane is located without notice and remove the same, an assignee of the mortgagee did not unlawfully convert the chattel by going upon the premises of one who had purchased it with constructive notice of the mortgage and taking possession of and removing the plane, making no effort at concealment and under circumstances in which no breach of the peace was likely to occur. *Kroeger v. Ogsden*, 429 P.2d 781 (Okla. 1967).

Where the finance company takes the collateral car from the possession of the debtor's sister-in-law with the statement that the company was going to keep the car there is an accord and satisfaction which terminates any liability of the debtor so that he is not liable for a deficiency resulting on resale. *Moody v. Nides Fin. Co.*, 115 Ga. App. 859, 156 S.E.2d 310 (1967).

Where franchise contract provided that piano manufacturer retained title to all goods shipped to dealer and that it could demand return of its property at any time, manufacturer was fully within its rights in repossessing its goods without assistance of formal legal process where there was no danger of a breach of the peace. *Parks v. Baldwin Piano & Organ Co.*, 262 F. Supp. 515 (D. Conn. 1967), *aff'd*, 386 F.2d 828 (2d Cir. Conn. 1967).

17. Repossession by action, generally.

Mere defect in replevin procedure by which secured creditor repossesses secured property is not ground upon which debtor, who fails to show substantive defense to repossession, may have default order for replevin set aside. *Dungan v. Dick Moore, Inc.*, 463 So. 2d 1094 (Miss. 1985).

The words, "by action", in this section refer to some procedural process provided by the state, exclusive of the Code, whereby a person entitled to property may recover, such as an action for replevin, and there is no special procedure spelled out in the New York Code for recovery by a secured party of his collateral upon default by the debtor. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

18. —Particular applications.

It is apparent from UCC § 9-503 that a secured party within UCC § 9-105(1) is permitted to proceed with statutorily recognized replevin action when debtor is in default under security agreement. *GECC v. Fred Pistone, Jr., Inc.*, 68 Misc. 2d 475 (1971).

19. —Particular applications; after bankruptcy of debtor.

When a plan has been filed under Chapter XIII in bankruptcy, a creditor cannot exercise the right of self-help to regain possession of the collateral but must file a reclamation petition in the bankruptcy proceedings. *First Nat'l Bank v. Cope*, 385 F.2d 404 (1st Cir. Me. 1967).

Since the UCC has abolished the technical distinctions between the various security devices, the federal bankruptcy courts should no longer feel compelled to engage in the purely theoretical exercise of locating "title"; nor should considerations of where "title lies" influence the courts in the exercise of their equitable discretion in ruling upon a security holder's petition for reclamation of collateral. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

20. Obligation to assemble collateral or make it available.

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held (1) that bank, under security agreement with debtor-seller of store, did not have

right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral-in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion-the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am.,*

Inc. v. First Ala. Bank, 361 So. 2d 568 (Ala. Civ. App. 1978).

Federal court had jurisdiction to grant mandatory injunction directing debtor to assemble collateral and make it available to creditor where state law authorized and security agreement required debtor on default to assemble and make available property to creditor and where property was located in several states. *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54 (5th Cir. Ala. 1970), reh'g denied, 434 F.2d 1039 (5th Cir. Ala. 1970), cert. denied, 402 U.S. 909, 91 S. Ct. 1382, 28 L. Ed. 2d 650 (1971).

21. Time and place of repossession.

Repossession of automobile was not wrongful under UCC § 9-503, which permits secured party to take possession of collateral on debtor's default, where (1) retail installment contract between buyer and seller provided that time was of the essence of the contract, that in event of buyer's default, seller had right to declare all amounts due or to become due to be immediately due and payable, that seller had right under Uniform Commercial Code to repossess vehicle, and that seller's waiver of any default should not be deemed to be a waiver of any other default, and (2) at time of seller's repossession of vehicle, buyer was in default on an installment payment. Moreover, the mere fact, if true, that several hours before repossession took place, buyer, without knowledge of or notice to seller, sent seller check by certified mail did not constitute payment of delinquent installment, since check was not received until after seller had repossessed vehicle. *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (E.D. Mo. 1978).

Under UCC § 9-503, the secured party does not have to secure the debtor's permission in order to take possession of the collateral without judicial process. Furthermore, removal from the premises of collateral that consists of heavy equipment is not required, since under UCC § 9-503, the secured party may render such equipment unusable or dispose of it. *Elliot v. Villa Park Trust & Sav. Bank*, 63 Ill. App. 3d 714, 380 N.E.2d 507 (Dist. 1978).

On default, secured party under UCC § 9-503 has right to take possession of collateral, unless parties have otherwise agreed, but such right does not impose obligation on secured party to take possession on debtor's demand. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

A security holder's right to possession of the collateral accrues immediately upon default of the security agreement, and hence where road-building equipment was in a certain county at the time of default, the right to possession accrued while the equipment was in that county; however, since nothing in the record showed that the removal of the equipment to another county contravened the security holder's right to possession, its cause of action in replevin accrued only after its demand for possession of the equipment was refused, when the equipment had been taken to the second county, and consequently its cause of action arose in the second county. *County Constr. Co. v. Livengood Constr. Corp.*, 393 Pa. 39, 142 A.2d 9 (1958).

22. Resale of collateral by secured party.

Where bank agreed to advance funds for floor-plan financing of new and used cars to be sold by debtor, where bank repossessed debtor's automobile stock after default pursuant to UCC § 9-503 and where debtor signed default agreement nine days after repossession which waived all notice of terms, times, and places of sale of repossessed automobiles, waiver of notification of sale of collateral following default was valid under UCC § 9-501(3). *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976).

Secured party was not entitled to recover deficiency judgment from cosigner of note where collateral securing note was repossessed and sold without notice to cosigner. *First State Bank v. Northrop*, 519 S.W.2d 161 (Tex. Civ. App. 1975).

Bank dealt with collateral securing promissory note in commercially reasonable manner, where, after defendant had paid only five monthly installments on note, bank sent notice, which met requirements of UCC § 9-504(3), to defendant by registered mail stating that collateral

would be sold at public sale, and thereafter proceeded with commercially reasonable public sale. *Bank of Josephine v. Hopson*, 516 S.W.2d 339 (Ky. 1974).

In the absence of evidence that following the repossession of a truck under a defaulted sales contract the collateral was sold and that a deficiency resulted, the security holder has no claim against the conditional purchaser. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

Effect of failure to sell repossessed collateral.-A security holder who has repossessed a truck under a defaulted conditional sales contract is required to liquidate it at reasonable public sale as a condition of seeking further recovery from the conditional purchaser; and the conditional purchaser's obligation is limited to whatever deficiency remains after such a sale. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

In a case where it was determined that indorsers upon a note given by a conditional buyer to a conditional seller were not discharged by the fact that the seller, after default, repossessed and resold the property, it was said that §§ 9-503 and 9-504 permitted such repossession and subsequent sale. *Priggen Steel Bldgs. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966).

23. Sale of collateral by debtor or third party.

Where (1) debtor, which owned chain of stores, obtained loan from defendant bank and gave bank security interest in inventory in one of debtor's stores, which interest bank perfected, (2) debtor subsequently sold two stores to plaintiff for \$14,000, of which approximately \$8,000 was attributable to sale of store in which bank had security interest in store's inventory, (3) plaintiff opened account with bank in name of store in which bank had security interest in store's inventory, and bank dishonored check written on such account, even though it had sufficient funds to cover check, because bank had applied all funds in account to overdue obligation of debtor-seller of such store, (4) plaintiff sued bank for amount withdrawn from plaintiff's account, and (5) bank filed counterclaim for plaintiff's alleged conversion of part of store's inventory, court held

(1) that bank, under security agreement with debtor-seller of store, did not have right to apply money deposited by plaintiff with bank, which represented funds received from sale of store's inventory in which bank had security interest, to satisfaction of debt owed to bank, (2) that although debtor's transfer of inventory to plaintiff was not effective against bank under UCC Article 6, dealing with bulk transfers, such fact did not render plaintiff personally liable to bank under UCC § 6-106(1) (which makes transferee of bulk sale liable for debts of transferor), since Alabama had not adopted UCC § 6-106, (3) that although plaintiff had attempted to comply with UCC § 6-104(1)(a) by requiring debtor to furnish plaintiff with list of debtor's existing creditors, debtor had failed to include bank on such list, (4) that since no debtor-creditor relationship existed between plaintiff and bank with respect to debt owed bank, bank had no right of set-off against funds in plaintiff's account, (5) that debtor's noncompliance with bulk transfer act merely made transfer to plaintiff ineffective as to bank, which retained its position as secured creditor, (6) that although under UCC § 9-201, a security agreement is effective against purchasers of collateral-in context of protecting secured party's interest by allowing repossession of collateral or action for its conversion-the terms of the security agreement, such as applying funds, are effective only between parties to the agreement and not against purchasers of collateral, (7) that term "proceeds" in UCC § 9-306(2), as applied to facts of present case, referred to \$8,000 received by debtor on sale of store's inventory to plaintiff and not to money received by plaintiff on its retail resale of such inventory, (8) that bank thus had no right to withdraw funds in plaintiff's account and apply them to debtor's obligation, (9) that debtor's bulk inventory sale to plaintiff was unauthorized disposition of the collateral under debtor's security agreement with bank, and (10) that since debtor, at time of such sale, was in default on its obligation to bank, bank had right under UCC § 9-503 to take possession of the collateral (inventory) and thus could maintain action of

conversion against plaintiff for plaintiff's resale of collateral. *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978).

When debtor is in default under security agreement, secured party has rights and remedies that agreement provides for. Thus, on default, creditor under UCC § 9-501(1) may reduce his claim to judgment, foreclose, or otherwise enforce his security interest by any available judicial procedure. In addition, unless otherwise agreed, secured party on default has right under UCC § 9-503 to take possession of collateral. Accordingly, where debtor, whose payments on indebtedness were up-to-date, was in default because he had sold collateral covered by security agreement to third person without informing secured party or obtaining his consent, secured party could recover property in claim and delivery action, since neither UCC § 9-501(1) nor UCC § 9-503 makes an exception for technical defaults that do not cause financial injury to secured party. *Gorham v. Denha*, 77 Mich. App. 264, 258 N.W.2d 196 (1977).

Where mortgagee is given right to take possession upon removal or sale of collateral, removal or sale by third person constitutes conversion for which mortgagee may sue third person. *Farmers State Bank v. Stewart*, 454 S.W.2d 908 (Mo. 1970).

24. Priorities among creditors.

Where guarantor of note and security agreement made partial payment on note, guarantor became subrogated to rights of secured party and was, thus, entitled to repossess collateral under UCC § 9-503 upon debtor's default. *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 542 P.2d 1042 (1975), appeal dismissed, 425 U.S. 928, 96 S. Ct. 1656, 48 L. Ed. 2d 170 (1976).

Where defendant agreed to pay for equipment, pump company agreed to furnish equipment, and tenant agreed that defendant would have interest in equipment, defendant had purchase money security interest in equipment and was entitled to prevail over landlord's rights under lease; held, where there were unquestionable defaults in payment by tenant, defendant could remove equipment so long as he did not convert any property of

landlord in so doing. *Honea v. Laco Auto Leasing, Inc.*, 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

RESEARCH REFERENCES

ALR. Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property. 49 A.L.R.2d 15.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like. 72 A.L.R.2d 342.

Punitive or exemplary damages for wrongful possession or repossession by holder of chattel mortgage or conditional sales contract. 35 A.L.R.3d 1016.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503. 75 A.L.R.3d 1061.

Secured transactions: right of secured party to take possession of collateral on default under UCC 9-503. 25 A.L.R.5th 696.

Validity, under Federal Constitution and laws, of self-help repossession provi-

sion of § 9-503 of Uniform Commercial Code. 29 A.L.R. Fed. 418.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 590 et seq.

Default; Taking possession of collateral, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:731-9:737.

Secured party's right to take possession after default, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3751 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

The recent erosion of the secured creditor's rights through cases, rules and statutory changes in bankruptcy law, 53 Miss. L. J. 389, September, 1983.

§ 75-9-610. Disposition of collateral after default.

(a) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) A secured party may disclaim or modify warranties under subsection (d):

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) A record is sufficient to disclaim warranties under subsection (e) if it indicates "There is no warranty relating to title, possession, quiet enjoyment or the like in this disposition" or uses words of similar import.

SOURCES: Derived from former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Obligation of good faith, see § 75-1-203.

Seller's resale of goods following buyer's rejection, see § 75-2-706.

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I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(1), (3).

A. In General.

6. Generally.

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to com-

ply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Mobile home is not collateral that threatens to decline speedily in value within meaning of UCC § 9-504(3). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Where the security instrument and its terms were not introduced in evidence, the trial court could not determine whether a default had occurred which would entitle the security holder to sell or otherwise dispose of the collateral. *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 155 S.E.2d 651 (1967).

In a case where it was determined that indorsers upon a note given by a conditional buyer to a conditional seller were not discharged by the fact that the seller, after default, repossessed and resold the property, it was said that §§ 9-503, and 9-504 permitted such repossession and subsequent sale. *Priggen Steel Bldgs. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966).

The secret disposition of the collateral by chattel mortgage owners and others was one of the evils the Uniform Commercial Code sought to correct. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

A sale by the creditor must be conducted in accordance with the article on sales. *Drew v. John Deere Co. of Syracuse, Inc.*, 19 A.D.2d 308 (4th Dep't 1963).

7. Constitutional issues.

Fact that Arizona's enactment of UCC §§ 9-503 and 9-504 greatly changed Arizona law, rather than merely codifying a preexisting common-law right, did not, in absence of further indications of govern-

ment involvement, establish state action in violation of debtor's right under Fourteenth Amendment to procedural due process, so as to give debtor, whose collateral was sold by creditor at foreclosure sale, right of action under 42 USCS § 1983. *Bosse v. Crowell, Collier & MacMillan*, 565 F.2d 602 (9th Cir. Ariz. 1977).

Where contract contains default and repossession provisions, private repossession is not infused with "state action" merely because state enacts §§ 9-503 and 9-504 of UCC. *Gibbs v. Titelman*, 502 F.2d 1107, 29 A.L.R. Fed. 406 (3d Cir. Pa. 1974), cert. denied, 419 U.S. 1039, 95 S. Ct. 526, 42 L. Ed. 2d 316 (1974).

Self-help repossession under UCC §§ 9-503 and 9-504 does not constitute sufficient state involvement to invoke jurisdiction of federal courts. *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1006, 95 S. Ct. 328, 42 L. Ed. 2d 283 (1974).

The prejudgment self-help repossession of secured property, as provided for in security agreements between creditors and debtors is authorized under sections of the California Commercial Code and do not involve sufficient state action to establish a federal cause of action. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. Cal. 1973), cert. denied, 419 U.S. 1006, 95 S. Ct. 325, 42 L. Ed. 2d 282 (1974).

Repossession and sale of collateral by secured party under UCC §§ 9-503 and 9-504 without giving debtor notice and hearing did not constitute state action and, hence, could not form basis for relief under Federal Civil Rights Act. *Teitelbaum v. Scranton Nat'l Bank*, 384 F. Supp. 1139, 34 A.L.R. Fed. 535 (M.D. Pa. 1974).

The self-help repossession statutes do not constitute sufficient state action to confer federal jurisdiction over action seeking declaration of unconstitutionality. *Thompson v. Keese*, 375 F. Supp. 195 (E.D. Ky. 1974).

Enactment of UCC §§ 9-503 and 9-504, providing for self-help repossession of mortgaged vehicle, did not constitute "state action" for purpose of determining constitutionality of procedure; nor did re-

possession of vehicle deprive buyer of any right of possession or ownership where buyer had voluntarily abandoned those rights by returning vehicle and rejecting it for alleged defect under UCC § 2-602. *Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1 (W.D. Mo. 1973), aff'd, 496 F.2d 16 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1006, 95 S. Ct. 328, 42 L. Ed. 2d 283 (1974).

Bank's repossession of automobile under conditional sales contract on debtor's failure to make required payment did not constitute action by state depriving debtor of property without due process of law in violation of Fourteenth Amendment. Though UCC § 9-503 recognizes right of self-help repossession of collateral, state personnel are not involved in act, and right of repossession is not creature of statute, but existed at common law. Moreover, right to deficiency judgment set forth in UCC § 9-504 is distinct from process of seizure, and its allowance does not affect nature of repossession procedure as one continuing from common law. *Kipp v. Cozens*, 40 Cal. App. 3d 709 (1st Dist. 1974).

State, by adopting UCC §§ 9-503 and 9-504, could not be held responsible for creating conditions which resulted in standardized contracts that are typically used in credit industry and provide for self-help repossession without notice or hearing prior to seizure; hence defendants' self-help repossession and sale of plaintiff's furniture, household goods and automobile pursuant to terms of agreement making said terms security for repayment of loan, as authorized by UCC, were not actions "under color of state law" sufficient to give federal court-jurisdiction under Civil Rights Act. *Johnson v. Associates Fin., Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973).

Self-help repossession by creditor does not constitute state action for purposes of invoking due process clause of Fourteenth Amendment, and UCC § 9-503, which authorizes secured party to take possession of collateral after default, but only if it can be attained peacefully without breach of peace, when considered in connection with UCC §§ 9-504 through 9-507, which contain provisions designed to insure that creditor cannot exercise his contract

rights in manner which enables him to profit from buyer's default, are not an unconstitutional deprivation of property without due process of law in violation of Fourteenth Amendment. *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973).

Self-help repossession authorized by UCC §§ 9-503 and 9-504 did not violate Fourteenth Amendment, where repossession did not constitute state action, self-help provisions were sufficiently fair to all parties, and purchasers agreed to remedy of repossession in contract which was one consideration for contract to finance purchase. *Cook v. Lilly*, 158 W. Va. 99, 208 S.E.2d 784 (1974).

8. Relationship with other laws.

Failure of creditor to give notice to co-obligor who was debtor under terms of statute violated statute, since co-obligors were entitled to notice of sale of collateral, and failure to give required statutory notice shifted burden to creditor to establish that sale of collateral conformed with reasonable commercial practices and creditor also assumed burden of proving that sum received for property represents fair market value. *United States v. Bryant*, 628 F. Supp. 1444 (N.D. Miss. 1986).

In an action for a deficiency judgment on a secured note, in which the maker of the note claimed a setoff for profits earned by guarantors of the note while the collateral was in their possession and used by them prior to the sale, the trial court erred in refusing to allow the jury to consider evidence of profits earned by the guarantors through their use of the collateral, since, once they had paid the note and received the collateral securing it, they were subject to all the rights and obligations of the creditor with regard to disposition of the collateral, pursuant to § 75-9-504(5), and since § 75-9-207(2)(c) obligated them to apply any net profits received from their possession of the collateral to reduce the secured obligation. *Murray v. Payne*, 437 So. 2d 47, 45 A.L.R.4th 379 (Miss. 1983).

Creditor's notice of public sale of collateral was sufficient under UCC § 9-504(3) to inform reasonable business persons of place of sale where (1) such notice was sent to debtor's office in Dallas, Texas; (2)

creditor's attorney, who signed notice, gave Houston, Texas address and phone number; (3) address of place of sale was given as "11601 North Houston-Rosslyn Road," although name of city (Houston) in which sale was to take place was not given; (4) name of owner of property to be sold was listed on notice as "Compression, Inc. of Houston, Texas"; and with owner of place in Houston, Texas where sale was conducted and thus had not been misled by failure of notice to state that place of sale was located in Houston, (5) that property had been brought to Houston, where demand for it was greatest, (6) that creditor had obtained property for \$100,000 and had later resold it for the same price, (7) that property's subsequent purchaser had refabricated it at some expense and ultimately had obtained only \$140,000 for it, (8) that demand at time of sale for that type of property was not great, and (9) that property's fair-market value (\$150,000) did not render its sale price (\$100,000) grossly inadequate. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), ref. n.r.e (Dec. 6, 1978).

In action by United States to recover on guaranty agreement executed by defendant to secure Small Business Administration loan made to corporation that subsequently defaulted on such loan, (1) where corporation's note for amount of loan, which was secured by three security agreements covering corporation's equipment, inventory, accounts, and rights under contracts entered into with customers, provided that holder of note could dispose of all or part of such collateral at public or private sale and that note was enforceable under applicable federal law; (2) where defendant's guaranty agreement provided that collateral could similarly be disposed of at public or private sale, subject to provisions of any existing agreement between corporation and lender and subject also to any provisions of law governing collateral's disposition, but failed to state whether guaranty was enforceable under federal or state law; and (3) where security agreements executed by corporation to lender, which were entered into at same time as note and guaranty, provided that Texas Uniform Commercial Code gov-

erned such transaction, Texas Uniform Commercial Code applied as federal law of decision and under UCC § 9-504(3), which Texas had adopted, disposition of collateral by Small Business Administration was required to be made in commercially reasonable manner. *United States v. Terrey*, 554 F.2d 685 (5th Cir. Tex. 1977).

Provision of motor vehicle retail installment sales act requiring, under certain circumstances, election between alternative remedies was in conflict with cumulative remedies provided in UCC §§ 9-503 and 9-504, and therefore, pursuant to UCC § 9-203(4), which provides that where there is any conflict between provisions of Article 9 of Uniform Commercial Code and provisions of motor vehicle retail installment sales act, provisions of latter statute shall apply, creditor with security interest in automobile was limited to election required by such statute where conditions precedent to applicability of statute had been met. *Chicago City Bank & Trust Co. v. Anderson*, 26 Ill. App. 3d 421, 325 N.E.2d 701 (1st Dist. 1975).

9. Security devices.

In lessor's suit for damages for lessee's default under personal property leasing agreement, where it was not established as matter of law that lease instrument created security interest in leased property or was anything other than a straight lease, rather than a memorandum showing a secured transaction, UCC § 9-504 and § 9-505, dealing with secured party's disposition of collateral, were inapplicable. *Robinson v. Granite Equip. Leasing Corp.*, 553 S.W.2d 633 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 5, 1977).

It does not matter whether the security agreement is in the form of a chattel mortgage or a conditional sales contract since the enactment of the UCC; for in either case the secured party has the right upon default to take possession of the collateral and to sell, lease or otherwise dispose of it, applying the proceeds to the indebtedness. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

10. Priority as to right to proceed.

Under UCC § 9-504(5), guarantor of debtor's note, as subrogee to rights of secured party, was successor to all of se-

cured party's rights against debtor, including security interest in debtor's equipment. *Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904 (2d Cir. N.Y. 1978).

A secured party may recover possession of collateral from a judicial officer who has taken possession of it under execution. *State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966).

11. Retention of collateral in satisfaction of debt.

Under UCC Article 9, secured party has two relevant options after repossessing goods of defaulting debtor. Under UCC § 9-505(2), secured party can retain collateral in satisfaction of debtor's obligation. Alternatively, under UCC § 9-504(1), secured party can sell repossessed goods, apply sale price to indebtedness, and look to debtor for any deficiency. However, UCC § 9-504(3) requires that any sale under that section must be commercially reasonable. *National Equip. Rental, Ltd. v. Priority Elecs. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977).

In order for a secured party to retain the collateral in satisfaction of the indebtedness, the requirements of UCC § 9-505(2) must be followed. Under this section, a secured party who proposes to retain the collateral must first notify the debtor and other secured parties of the plan. And if a person entitled to notice objects, the sale provisions of UCC § 9-504 then become applicable. *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223 (8th Cir. Mo. 1978).

B. Commercial Reasonableness.

12. In general.

Mobile home is not collateral that threatens to decline speedily in value within meaning of UCC § 9-504(3). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

UCC § 9-504(3), which provides that every aspect of disposition of collateral must be commercially reasonable and that reasonable notification of such disposition must be sent to debtor, cannot be waived, as is expressly declared by UCC 9-501(3)(b). *Savings Bank v. Booze*, 34 Conn. Supp. 632, 382 A.2d 226 (1977).

UCC § 9-504 permits secured party after default to both sell or lease collateral in any commercially reasonable manner and does not limit damages to legal rate of interest only. *Affiliated Food Stores, Inc. v. Bank of N.E. Ark.*, 259 Ark. 690, 536 S.W.2d 693 (1976).

UCC § 9-504 regulating sale of repossessed collateral does not require public sale on notice, but only that sale be "commercially reasonable". *Stanchi v. Kemp*, 48 A.D.2d 973 (3d Dep't 1975).

Where properly seized by creditor to protect its security interest was not sold or disposed of in a commercially reasonable manner, and the record did not disclose an adequate account of the sale and disposition of the property, a new trial will be ordered. *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196 (Ky. 1964).

13. Criteria of reasonableness.

A trial court erred in holding that the sale of a repossessed vehicle at a dealers-only auction was "per se" commercially unreasonable; whether such a sale is commercially reasonable is a question for the finder of fact in a particular case, since the disposition of repossessed property at a dealer-only wholesale auction may be commercially reasonable when the factors of manner, method, time, place and terms of sale are considered. *Ford Motor Credit Co. v. Mathis*, 660 So. 2d 1273 (Miss. 1995).

The standard of commercial reasonability is predicated on two concepts that are prevalent throughout the Uniform Commercial Code. First, all commercial transactions must be conducted in good faith. Second, commercial matters, if it is at all possible, should be resolved by the means that are normally employed to handle such matters in the particular business, so long as such means deal fairly with all parties. Generally, a secured party acts in a commercially reasonable manner if, when disposing of repossessed security, he acts in good faith and in accordance with commonly accepted commercial practices that afford fair treatment to all parties. *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

Primary focus of commercial reasonableness of sale of collateral under UCC § 9-504(3) is not proceeds received from

sale, but procedures employed for sale. If secured creditor makes certain that conditions of sale, with respect to aggregate effect of manner, time, place, and terms employed, conform to commercially accepted standards, he should be shielded from sanctions contained in Article 9. *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977).

Sale of collateral, which consisted of vehicles and equipment in automobile dealer's inventory and dealer's accounts receivable, was conducted in commercially reasonable manner under UCC § 9-504(3) where (1) debtor was given reasonable notification of time, place, and terms of sale of inventory; (2) creditor attempted to make certain that all conditions of sale were in conformity with commercially accepted standards; (3) creditor attempted to obtain best possible price for every vehicle sold by reviewing all bids therefor to determine their reasonableness; and (4) creditor rejected all unreasonable bids for vehicles and later sold such vehicles for a higher price. *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977).

Under UCC § 9-504(3), whenever disposition of collateral is to be made by public or private sale, secured party must give reasonable notice of time of sale to debtor, and every aspect of the disposition, including method, manner, time, place, and terms, must be commercially reasonable. *American Lease Plans, Inc. v. Cardin*, 558 S.W.2d 325 (Mo. Ct. App. 1977).

Factors to be considered in determining whether sale of collateral was commercially reasonable under UCC § 9-504(3) include (1) price received at sale by secured party, (2) price received by buyer of collateral in subsequent sale, (3) whether collateral was sold on retail or wholesale market, (4) number of bids received, especially at private sale, and (5) time and place of sale, especially public sale, with regard to securing attendance of satisfactory number of bidders. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Foreclosure sale of stock in small, closely-held corporation, which stock had

been pledged to secure loan to debtors, was conducted in commercially reasonable manner as required by UCC § 9-504(3) where due notice was published and also given to debtors, public auction conducted by secured party's attorney took place on noticed date, secured party made best and only offer in amount of stock's book value, and amount bid was fair since stock represented only minority interest in corporation; fact that sale took place in one city, although business of corporation was located in another city, did not make sale unreasonable considering that debtors' note was pledged in first city and corporate headquarters of secured party was also in first city. *Nola v. Merollis Chevrolet Ky. City, Inc.*, 537 S.W.2d 627 (Mo. Ct. App. 1976).

In action by secured party to recover deficiency judgment after repossession and sale of collateral, secured party must allege and, unless admitted, prove that sale was commercially reasonable as required by UCC § 9-504(3); relevant factors in determining commercial reasonableness include amount of advertising done, normal commercial practices in disposing of particular collateral, length of time elapsing between repossession and resale, whether deterioration of collateral has occurred, number of persons contacted concerning sale and price obtained. *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 87 N.M. 451, 535 P.2d 1077, 10 A.L.R.4th 404 (1975).

14. —Method and manner; reasonable.

In action against guarantor to recover balance due on loan, where guarantor, instead of making good on its guaranty, advised creditor to dispose of collateral over extended period of time through liquidator specially recommended by guarantor, but creditor sold collateral at public auction and net proceeds of sale were insufficient to pay off balance due on loan, guarantor could not successfully contend that because of creditor's failure to follow guarantor's recommendation for disposing of collateral, collateral was thereby unjustifiably impaired so as to discharge guarantor under UCC § 9-606(1)(b), since guarantor had waived its right to claim such discharge by consenting in its guar-

anty to auction sale as appropriate method for disposal of collateral. Moreover, such consent was not vitiated by creditor's alleged failure to meet its obligation under UCC § 9-504(3) to dispose of collateral in commercially reasonable manner — which obligation assertedly was not met because of creditor's failure to follow guarantor's recommendation which purportedly would have resulted in a higher price for the collateral—since UCC § 9-507(2) expressly states that fact that different method of disposition would have produced a better price does not of itself establish that sale was not made in a commercially reasonable manner. In addition, UCC § 9-507(2) also states that disposition of collateral that has been approved in any judicial proceeding shall conclusively be deemed to be commercially reasonable, and in present case sale of collateral had been approved by court in debtor's receivership proceedings, and guarantor had not attempted to restrain such sale after creditor had committed itself to an auction sale. *Rhode Island Hosp. Trust Nat'l Bank v. National Health Found.*, 119 R.I. 823, 384 A.2d 301 (1978).

Public liquidation sale of debtor's inventory by federal Small Business Administration was commercially reasonable under UCC § 9-504(3) where (1) sale was adequately advertised in large newspaper of general circulation on three occasions prior to sale, (2) 400 direct advertisements were mailed to trade persons prior to sale, (3) defendant was given reasonable notification of sale, and (4) conduct of sale fully complied with statute's requirements. *United States ex rel. Small Bus. Admin. v. Gore*, 437 F. Supp. 344 (E.D. Pa. 1977).

Sale of repossessed new motor homes was commercially reasonable under UCC § 9-504 where (1) sale was conducted at time of extremely depressed market, (2) sale of units by private and public sale brought in excess of 75 per cent of total indebtedness, (3) expenses of sale were very low inuring to debtor's benefit, and (4) expense of conducting auction sale, including advertising and commissions, would have been much higher, with no guarantee that any greater amount would have been received from such sale under conditions of market. *Pruske v. National*

Bank of Commerce, 533 S.W.2d 931 (Tex. Civ. App. 1976).

Where debtor had knowledge of location of lot where repossessed cars were being sold, contacted and sent perspective buyers to lot, was notified of time and place of auctions, and where none of cars were sold until after agreement for disposition of collateral was signed by debtor, disposition of collateral was conducted in commercially reasonable manner and secured party was entitled to deficiency judgment pursuant to UCC § 9-504. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976).

Sale of repossessed logging equipment at public auction was reasonable despite contentions that better price could have been received elsewhere and that better price could have been received if machine were disassembled and sold for parts; receipt of notice of sale by debtor was not required under UCC, only requirement being reasonable attempt of reposessor to notify, and debtor could not rely upon misstatement of place of sale in notice of sale where debtor claimed he never received notice. *James Talcott, Inc. v. Reynolds*, 165 Mont. 404, 529 P.2d 352 (1974).

Sale of property of bankrupt cosmetic manufacturer for purpose of liquidation was commercially reasonable where it was adequately advertised, conducted by experienced auctioneer, and 14 people registered their presence at the auction, despite fact that it resulted in \$3,000 bid for property having a much higher cost value. *In re Zsa Zsa, Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. N.Y. 1973).

A trial court possessing equity powers, having acquired jurisdiction of an action to foreclose a real estate mortgage executed by the trustee of a land trust to a savings and loan association, had power to order the sale of the certificate of beneficial interest in the same land trust which had been pledged as collateral security to another savings and loan association in liquidation, and the subsequent sale of the beneficial interest in open court at public auction complied with the provisions of subsec. (3) of this section. *Lawn Sav. & Loan Ass'n v. Quinn*, 81 Ill. App. 2d 304, 225 N.E.2d 683 (1st Dist. 1967).

15. —Method and manner; not reasonable.

Where collateral soybeans were removed from storage bin at creditor's direction and allowed to remain piled up in an open building for almost six weeks prior to sale, procedures used by creditor to liquidate collateral were so devoid of any hint of commercial reasonableness that debtor could not be considered to have waived rights to protest disposition of collateral through language of farm storage notes and security agreements. *Jones v. United States ex rel. Commodity Credit Corp.*, 107 B.R. 888 (Bankr. N.D. Miss. 1989).

Disposition of collateral, which consisted of an electronic two-way communications system, was not commercially reasonable under UCC § 9-504(3) where (1) secured party was successful bidder at public auction of the collateral, (2) only one other bid was made, (3) bidders in attendance at sale with any real interest in the collateral were few in number, (4) few efforts were made to encourage meaningful bidding, and (5) substantial disparity existed between price recovered on the disposition (\$32,775) and deficiency for which judgment was sought (slightly over \$325,000). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

Disposition by creditor of debtor corporation's collateral, pursuant to security agreements entered into by debtor to secure note evidencing loan made by creditor, was commercially unreasonable under UCC § 9-504(3) where (1) creditor admitted that although it ordinarily utilized public auctions to sell collateral only as last resort, it had decided in present case to sell debtor's collateral at public auction only two days after collateral was turned over to creditor; (2) creditor did not take any history of debtor's business or inventory and appraise debtor's assets, including contracts entered into by debtor with its customers; (3) creditor made no effort to find person who would buy debtor corporation; (4) creditor refused to postpone auction sale of collateral for three weeks in order to give prospective buyer of debtor corporation, whom creditor had not located, sufficient time to consider such purchase, even though delay would only have cost creditor one month's rent on

debtor's premises; (5) creditor further required that prospective purchaser make firm offer of \$50,000 for debtor's business, even though piecemeal sale of debtor's collateral at public auction realized only \$15,000; and (6) creditor did not even try to sell as integrated units two nearly completed signs that debtor was constructing for commercial use, which allegedly were worth \$56,000. *United States v. Terrey*, 554 F.2d 685 (5th Cir. Tex. 1977).

Where bank upon default repossessed automobile which secured note, giving debtor notice of sale and where bank, before car was transferred to buyer after public sale, was notified by state police that car was stolen, bank's disposition of debtor's collateral by surrendering automobile to police upon oral request without requiring proof that car was stolen, without giving notice to debtor of seizure of car, thus depriving debtor of opportunity to defend title, was not commercially reasonable within meaning of UCC 9-504(3) and debtor was entitled to credit on indebtedness owed to bank from proceeds of nonconsumated public sale of automobile. *New Jersey Bank v. Green*, 145 N.J. Super. 560, 368 A.2d 431 (1976).

In action by assignee of automobile conditional sales contract against conditional vendee, trial court erred in determining that plaintiff was entitled to deficiency judgment, where complaint alleged only that defendant's automobile was repossessed, that notice of sale was sent, and that automobile was sold for stated sum, which amounted to less than 50 per cent of wholesale blue book value, where only evidence bearing on manner of resale was that automobile was stored, was available for inspection, and five bids were submitted, and where there was no evidence explaining substantial discrepancy between price received and book value. Failure to use "best efforts" to obtain highest possible price for collateral was breach of secured party's obligation under UCC § 9-504, to act in good faith and in commercially reasonable manner. *Credit Bureau Metro, Inc. v. Mims*, 45 Cal. App. 3d Supp. 12 (App. Dep't Super. 1975).

Where secured party did not advertise or otherwise make normal and reasonable contacts within the industry but rather

took the quick and easy way out by selling the aircraft in question to the same people who had been using it, the sale was not conducted in a "commercially reasonable manner" which was required before secured party could recover deficiency judgment. *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659 (W.D. Okla. 1972).

Where after repossession of yacht seller placed single advertisement in newspaper but failed to advertise in any of customary yachting publications, did not seek services of yacht broker, obtained no purchase offers other than three which had "curiously improbable air," and allowed yacht to depreciate at ruinously progressive rate over two full boating seasons, his conduct did not indicate that he had accepted and retained collateral in satisfaction of obligation, but was not commercially reasonable; and buyer's widow was entitled in action for accounting to credit equal to value of yacht at time of repossession. *Harris v. Bower*, 266 Md. 579, 295 A.2d 870, 55 A.L.R.3d 640 (1972).

16. —Time.

Where assignee (secured party) of equipment lease of drilling machine, on default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to deficiency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

Mobile home is not collateral that threatens to decline speedily in value within meaning of UCC § 9-504(3). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Disposition by creditor of debtor corporation's collateral, pursuant to security agreements entered into by debtor to secure note evidencing loan made by creditor, was commercially unreasonable under UCC § 9-504(3) where (1) creditor admitted that although it ordinarily utilized

public auctions to sell collateral only as last resort, it had decided in present case to sell debtor's collateral at public auction only two days after collateral was turned over to creditor; (2) creditor did not take any history of debtor's business or inventory and appraise debtor's assets, including contracts entered into by debtor with its customers; (3) creditor made no effort to find person who would buy debtor corporation; (4) creditor refused to postpone auction sale of collateral for three weeks in order to give prospective buyer of debtor corporation, whom creditor had not located, sufficient time to consider such purchase, even though delay would only have cost creditor one month's rent on debtor's premises; (5) creditor further required that prospective purchaser make firm offer of \$50,000 for debtor's business, even though piecemeal sale of debtor's collateral at public auction realized only \$15,000; and (6) creditor did not even try to sell as integrated units two nearly completed signs that debtor was constructing for commercial use, which allegedly were worth \$56,000. *United States v. Terrey*, 554 F.2d 685 (5th Cir. Tex. 1977).

Where equipment lessees were given ample time to arrange for sale of equipment following their default under lease agreement, sale of equipment by lessors was conducted in commercially reasonable manner, and lessees failed to timely raise issue as to lack of statutory notice of sale pursuant to UCC § 9-504(3), lessor was entitled to recover balance due under lease. *Maguire Leasing Corp. v. Irving Falb & Co.*, 49 A.D.2d 540 (1st Dep't 1975).

Secured party's retention of depreciable collateral, an automobile, without sale for two years after debtor defaulted and automobile was repossessed, although requiring close scrutiny of secured party's actions, was not unreasonable in view of evidence, inter alia, that vehicle was in such poor condition on repossession that secured party could not resell it; nor did retention of collateral for two years constitute satisfaction of debtor's obligation under UCC § 9-505(2), thus depriving secured party of right to sue on note. *Jones v. Morgan*, 58 Mich. App. 455, 228 N.W.2d 419 (1975).

In action by secured party to recover deficiency judgment after repossession and sale of collateral, secured party must allege and, unless admitted, prove that sale was commercially reasonable as required by UCC § 9-504(3); relevant factors in determining commercial reasonableness include amount of advertising done, normal commercial practices in disposing of particular collateral, length of time elapsing between repossession and resale, whether deterioration of collateral has occurred, number of persons contacted concerning sale and price obtained. *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 87 N.M. 451, 535 P.2d 1077, 10 A.L.R.4th 404 (1975).

In view of question whether published notice of sale of repossessed bulldozer might have indicated to casual observer that sale had already taken place, total absence of evidence about normal commercial practices in disposition of this type of collateral, length of time elapsing between repossession and sale, possibility that bulldozer may have abnormally deteriorated during that period, failure of seller to notify persons who had expressed interest in purchasing equipment of intended sale, and evidence of remarks made by one who may have been taken to be seller's manager indicating his indifference to price for which bulldozer might be sold, jury question was presented as to seller's good faith and commercial reasonableness of every aspect of disposition of collateral. *Farmers Equip. Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972).

17. —Place.

Jury finding that creditor had conducted public sale of collateral in commercially reasonable manner required by UCC § 9-504(3) was supported by evidence which showed (1) that creditor had advertised sale for two days in Houston, Texas daily newspaper, (2) that it had mailed notices to 19 used-equipment companies, (3) that prospective purchaser from Oklahoma City, Oklahoma, who received one of the mailed notices, had come to Houston and inspected the property, (4) that all but two of the used-equipment companies notified by the creditor had done business (5) debtor produced no evidence that it did not understand or could

not deduce place of sale from notice and also failed to show that it had been prejudiced by omission of "Houston, Texas" from address of place of sale. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), *ref. n.r.e* (Dec. 6, 1978).

Mobile home is not collateral that threatens to decline speedily in value within meaning of UCC § 9-504(3). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Where owner of automobile, which was repossessed after default on installment contract, did not receive notice of place of public sale and where, although automobile was in good condition, proceeds obtained less than six months after initial purchase were only about 55% of the amount originally financed, creditor could not recover deficiency judgment in absence of showing that the method, manner, time, place and terms of sale were in fact commercially reasonable. *Marine Midland Bank-Central v. Watkins*, 89 Misc. 2d 949 (1977).

Evidence raised sufficient question concerning notice of location of foreclosure sale and the sale's commercial reasonableness under UCC § 9-504 so as to warrant injunction to preserve status quo until resolution of issue at trial, where evidence indicated that notice of sale specified "door of the Courthouse" which was uniformly interpreted as meaning the south door, that no foreclosure sale had ever been conducted at any other courthouse door, that notice of sale was posted at the south door but not at the north door, that persons attempting to serve restraining order went to south door, but that sale was conducted at the north door. *Jones v. Garcia*, 538 S.W.2d 492 (Tex. Civ. App. 1976).

Foreclosure sale of stock in small, closely-held corporation, which stock had been pledged to secure loan to debtors, was conducted in commercially reasonable manner as required by UCC § 9-504(3) where due notice was published and also given to debtors, public auction conducted by secured party's attorney took place on noticed date, secured party made best and only offer in amount of

stock's book value, and amount bid was fair since stock represented only minority interest in corporation; fact that sale took place in one city, although business of corporation was located in another city, did not make sale unreasonable considering that debtors' note was pledged in first city and corporate headquarters of secured party was also in first city. *Nola v. Merollis Chevrolet Ky. City, Inc.*, 537 S.W.2d 627 (Mo. Ct. App. 1976).

In action by noteholder for deficiency after sale of collateral, noteholder had burden of proving defendant was given proper notice of sale within meaning of UCC § 9-504(3). Notice was misleading, inaccurate and unreasonable where automobile being sold was not present, where defendant was not given opportunity to bid, where no other potential purchasers were present, where alleged "public sale" was held in Chicago law office while collateral was located in another city, and where bids were received at undisclosed price from undisclosed persons. *General Foods Corp. v. Hall*, 39 Ill. App. 3d 147, 349 N.E.2d 573 (1st Dist. 1976).

Sale of two aircraft at public sale was commercially reasonable, notwithstanding fact that due to combination of bad weather and mechanical failure only one aircraft was present at sale, where good and sufficient notice was timely given to reasonable number of prospective buyers, no prospective bidders present at public sale questioned absence of plane and asked for inspection, circumstances attending absence of plane were beyond control of secured party and excusable, holding of sale at time and place scheduled was to best interest of all and fair price was secured. *C.I.T. Corp. v. Lee Pontiac, Inc.*, 513 F.2d 207 (9th Cir. Idaho 1975).

18. —Terms.

Secured party conducted sale of collateral consisting of grocery store inventory and fixtures in commercially reasonable manner under UCC §§ 9-504(3) and 9-507(1) where, although notice was given to debtor that private sale would be conducted on or after August 4, 1975, conditional sale of inventory was made to buyer before August 4, subject to secured party's not receiving higher price for inventory,

where buyer paid \$28,000, which represented 75 per cent of retail value of inventory, was going market rate for inventory and was in fact amount debtor paid when he purchased grocery store, and where although debtor had repurchase agreement with previous owner's store for fixtures at price of \$24,000, secured party sold fixtures to purchaser of inventory for \$8,000 less because purchaser had agreed to purchase inventory at 75 per cent of retail. *First Nat'l Bank & Trust Co. v. Halston, Okla.*, (1976).

Under UCC, adequacy or insufficiency of price for which collateral is sold at private sale after default and repossession is one of "terms" of sale, and is relevant along with other issues, in determining whether sale was commercially reasonable. *Associates Fin. Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973).

Under UCC §§ 9-504(3) and 9-507(2), the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. *First Nat'l Bank v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

19. —Terms; condition of collateral.

Evidence that secured party offered repossessed equipment for sale in same condition it was in when it was repossessed, uncleaned and unwashed, was relevant in determining whether sale of collateral by secured party was commercially reasonable as required by UCC § 9-504. Furthermore, where advertisements for sale stated terms were to be cash, but at beginning of sale secured party's representative announced that terms were to be cash or certified check, jury could have found this changed terms of sale from cash or approved uncertified check to cash or certified check and that such change dissuaded prospective purchasers from bidding and was commercially unreasonable. *Weiss v. Northwest Acceptance Corp.*, 274 Or. 343, 546 P.2d 1065 (1976).

Secured party was not entitled to recover alleged deficiency due after sale of repossessed automobile since (1) three days' notice of resale was not commercially reasonable under UCC § 9-504(3);

(2) sale of automobile for only \$50 was not in good faith, under UCC § 1-203, or in commercially reasonable manner under UCC § 9-504(3), although automobile was inoperable, where casual inspection would have revealed that automobile was missing spark plugs, points and air cleaner, and installation of these items would have made car operative and would only have required small expenditure; and (3) presumption that collateral was worth at least amount of debt, which arose as result of secured creditor's failure to give sufficient notice of resale, was not overcome by creditor's evidence. *Franklin State Bank v. Parker*, 136 N.J. Super. 476, 346 A.2d 632 (1975).

20. —Terms; price adequate.

Secured creditor's foreclosure sale was conducted in commercially reasonable manner, even though subsequent sale of collateral purchased by secured creditor at foreclosure sale enabled secured creditor to receive an amount over and above price paid at foreclosure sale. In re *Whately*, 126 B.R. 231 (Bankr. N.D. Miss. 1991).

Disposition of collateral, which consisted of an electronic two-way communications system, was not commercially reasonable under UCC § 9-504(3) where (1) secured party was successful bidder at public auction of the collateral, (2) only one other bid was made, (3) bidders in attendance at sale with any real interest in the collateral were few in number, (4) few efforts were made to encourage meaningful bidding, and (5) substantial disparity existed between price recovered on the disposition (\$32,775) and deficiency for which judgment was sought (slightly over \$325,000). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

In action by debtor for creditor's wrongful repossession and conversion of collateral, evidence of value of collateral at time it was sold, where creditor did not give debtor notice of sale required by UCC § 9-504(3), was relevant because it went toward proof of conversion. *Ott v. Fox*, 362 So. 2d 836 (Ala. 1978).

Creditor's notice of public sale of collateral was sufficient under UCC § 9-504(3) to inform reasonable business persons of place of sale where (1) such notice was

sent to debtor's office in Dallas, Texas; (2) creditor's attorney, who signed notice, gave Houston, Texas address and phone number; (3) address of place of sale was given as "11601 North Houston-Rosslyn Road," although name of city (Houston) in which sale was to take place was not given; (4) name of owner of property to be sold was listed on notice as "Compression, Inc. of Houston, Texas"; and with owner of place in Houston, Texas where sale was conducted and thus had not been misled by failure of notice to state that place of sale was located in Houston, (5) that property had been brought to Houston, where demand for it was greatest, (6) that creditor had obtained property for \$100,000 and had later resold it for the same price, (7) that property's subsequent purchaser had refabricated it at some expense and ultimately had obtained only \$140,000 for it, (8) that demand at time of sale for that type of property was not great, and (9) that property's fair-market value (\$150,000) did not render its sale price (\$100,000) grossly inadequate. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), *ref. n.r.e* (Dec. 6, 1978).

In action to recover balance due on guaranty agreement executed in connection with conditional sales contract for purchase of back hoe, which was repossessed after buyer's default in making payments and sold to highest bidder for \$10,500, where hoe had been appraised as having an "as is" trade-in value of \$20,000 and, if repaired, a value of up to \$25,000, and where guarantor alleged that sale of hoe was therefore not commercially reasonable under UCC § 9-504(3), court held that marked discrepancy between hoe's appraised value and its sale price raised sufficient question as to whether its sale had been conducted in commercially reasonable manner to warrant trial on such issue. *GECC v. Durante Bros. & Sons*, 96 Misc. 2d 561 (1978).

The secured party has the burden of showing that the sale of repossessed collateral was commercially reasonable, as required by UCC § 9-504(3). This burden may not be satisfied without affirmatively establishing that the terms of the sale were commercially reasonable. This, in

turn, requires the secured party to show that the sale price was the fair and reasonable value of the collateral. *Vines v. Citizens Trust Bank*, 146 Ga. App. 845, 247 S.E.2d 528 (1978).

Contention that creditor did not dispose of collateral in commercially reasonable manner required by UCC § 9-504(3), on ground that creditor failed to prove either value of collateral at time of its repossession or that its resale price was fair and reasonable, was not sustainable where record showed (1) that collateral consisted of thousands of automobile parts, each of which had to be individually inventoried, evaluated, and priced, (2) that total value of all such items was approximately \$39,000 at time of repossession, (3) that collateral was stored in creditor's warehouse without charge to debtor, (4) that bids were solicited from 150 automobile parts dealers, (5) that approximately one dozen inquiries were made and five bids were submitted, and (6) that collateral was sold to highest bidder for \$15,000. *Ace Parts & Distrib., Inc. v. First Nat'l Bank*, 146 Ga. App. 4, 245 S.E.2d 314 (1978).

Where no compliance with notice of sale provision has been shown, burden of proving that market value of collateral was received at sale is upon secured party; held, burden was met where it was established that best available current price for four repossessed dump trucks was received and that sale was made in commercially reasonable manner; therefore, trial judge could have concluded that reasonable man could not find that any damages were suffered by virtue of failure to give notice of sale after repossession. *Weaver v. O'Meara Motor Co.*, 452 P.2d 87 (Alaska 1969).

Where the conditional purchaser of repossessed construction equipment received credit for the full price paid for it at the sale conducted by the security holder, the effect was as if the equipment had been sold for the exact amount the debtor had paid for it, and the debtor could not complain that he was not given notice of the sale as provided for in subd (3) of this section, the sale having been a commercially reasonable one, and the debtor made no offer of proof that the price paid for the security was less than its actual

value. *BSY Co. v. Fuel Economy Eng'g Co.*, 399 S.W.2d 308 (Ky. 1965).

21. —Terms; price inadequate.

Although UCC § 9-507(2) provides that the fact that a better price could have been obtained at a different time or in a different method from that selected by the secured party is not, by itself, sufficient to establish that the sale was not made in a commercially reasonable manner, price is nevertheless a "term" of sale under UCC § 9-504(3). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed or distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

In action by debtor for creditor's wrongful repossession and conversion of collateral, evidence of value of collateral at time it was sold, where creditor did not give

debtor notice of sale required by UCC § 9-504(3), was relevant because it went toward proof of conversion. *Ott v. Fox*, 362 So. 2d 836 (Ala. 1978).

Where owner of automobile, which was repossessed after default on installment contract, did not receive notice of place of public sale and where, although automobile was in good condition, proceeds obtained less than six months after initial purchase were only about 55% of the amount originally financed, creditor could not recover deficiency judgment in absence of showing that the method, manner, time, place and terms of sale were in fact commercially reasonable. *Marine Midland Bank-Central v. Watkins*, 89 Misc. 2d 949 (1977).

Secured party failed to sustain its burden of proving that disposition of collateral was commercially reasonable, as required by UCC § 9-504(3), where it sold repossessed automobile, which had been purchased for over \$1600 some three months earlier, for \$300 at auction sale which had been advertised once, and where possibilities for self-dealing were substantial; thus, secured party was barred from recovering deficiency under UCC § 9-504(2). *Central Budget Corp. v. Garrett*, 48 A.D.2d 825 (2d Dep't 1975).

It was necessary for seller of automobile to establish that every aspect of sale of automobile after buyer's default was commercially reasonable, including adequacy of price for which automobile was sold; and private sale by seller which took place by means of inter-office exchange of papers with automobile sold back into seller's inventory at appraised "wholesale" value was as matter of law commercially unreasonable. *Vic Hansen & Sons v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728, 59 A.L.R.3d 360 (1973).

Auto dealer sold car to defendant-buyer for net sum of \$1700; dealer assigned sales contract to plaintiff-assignee; plaintiff-assignee repossessed auto and sold it back to dealer for \$348; held, sale was not "commercially reasonable" disposition of collateral. *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138 (1969).

Where after repossession, a finance company sold an automobile for less than one-half of one recognized criterion of

market price, there were equitable grounds for giving debtors right to prove that the sale was not made in a commercially reasonable manner. *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (1961).

22. Purchase by creditor; public sale.

Disposition of collateral, which consisted of an electronic two-way communications system, was not commercially reasonable under UCC § 9-504(3) where (1) secured party was successful bidder at public auction of the collateral, (2) only one other bid was made, (3) bidders in attendance at sale with any real interest in the collateral were few in number, (4) few efforts were made to encourage meaningful bidding, and (5) substantial disparity existed between price recovered on the disposition (\$32,775) and deficiency for which judgment was sought (slightly over \$325,000). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

Creditor's foreclosure sale of jet aircraft was not commercially reasonable under UCC § 9-504(3) where (1) creditor incurred minimal expense in advertising plane for sale; (2) creditor made no effort to interest groups of dealers in buying plane, although a group of dealers was the most logical buyer; (3) creditor bought plane for \$325,000, although its minimum fair-market value was at least \$700,000, and later resold it for \$855,000; and (5) creditor kept plane at secret location until time of sale, thus preventing potential buyers from inspecting it. *Connex Press, Inc. v. International Airmotive, Inc.*, 436 F. Supp. 51 (D.D.C. 1977), *aff'd*, 574 F.2d 636, 187 U.S. App. D.C. 425 (1978).

Summary final judgment was improperly entered in action for deficiency judgment against guarantor of debt of corporation where evidence showed (1) that debtor corporation had given creditor chattel mortgage on airplane as security for debt, (2) that airplane had been sold at public sale by county sheriff for sales and use taxes assessed against debtor corporation, and (3) that creditor had purchased airplane at such sale and thereafter resold it, allegedly at private sale not conducted in commercially reasonable manner required by UCC § 9-504(3), and had applied proceeds against principal amount due on debtor corporation's note.

In such case, creditor's contention that since it owned airplane after sheriff's sale, it was therefore under no requirements whatever concerning its subsequent sale could not be sustained, since action was for deficiency judgment after creditor's private sale of plane and such sale, if it were to produce a deficiency, was an element of the action that had to be proved without genuine issue before a summary final judgment could be entered. *Applestein v. National Bank of Tulsa*, 358 So. 2d 106 (Fla. App. 1978).

Plaintiff bank, which made a corporate loan for the purchase of two mechanical devices used in the manufacture of elevator equipment, the loan being secured by a chattel mortgage on the purchased equipment, a contract of repurchase of the equipment by the seller of the equipment at a reduced purchase price and the personal guarantees of the three defendants who formed the corporation and were the sole stockholders, and which then, upon default and repossession of the equipment, did not seek to enforce the agreement of repurchase, but instead hired the seller of the equipment to act as its agent for the purpose of selling the repossessed equipment, which the seller purchased for itself at the foreclosure sale and then later resold at a profit, is not entitled to a deficiency judgment against defendants since plaintiff failed to sustain its burden of proof of "reasonable notification" of sale to the debtor corporation and that "the method, manner, time and terms" of the disposition were "commercially reasonable". (Uniform Commercial Code, § 9-504.) Although the mere fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a "commercially reasonable" manner, defined as the disposition of security "made in the good faith attempt to dispose of the collateral to the parties' mutual best advantage", where, however, marked discrepancies between the disposal and sale prices signal a need for closer scrutiny, especially where the possibility for self-dealing is substantial, the creditor should be denied a deficiency judgment in the absence of some affirma-

tive showing that the terms of the disposition were in fact commercially reasonable. Since plaintiff offered no proof of the "fair value" of the security either at the time of repossession or sale, there is no need to determine if a creditor has the optional alternative of recovering a deficiency judgment "by proving the amount of the debt, the fair value of the security and the resulting deficiency". (See *Security Trust Co. v. Thomas*, (1977, 4th Dept) 59 AD2d 242, 399 NYS2d 511, 22 UCCRS 1305.) *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), *aff'd*, 70 A.D.2d 786 (4 Dep't 1979).

Under UCC § 9-501(1), as explained in Official Comment 6, a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure outside Art 9 that state law may provide. The first sentence of UCC § 9-501(5) makes clear that any judgment lien that the secured party may acquire against the collateral is a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore said to relate back to the date of perfection of the security interest. The second sentence of UCC § 9-501(5) makes clear that a judicial sale following judgment, execution, and levy is one of the methods of foreclosure contemplated by UCC § 9-501(1). Such a sale is governed by other law and not by Art 9, and the restrictions that Art 9 imposes on the right of a secured party to buy in the collateral at a sale under UCC § 9-504 do not apply. *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 572 P.2d 489 (1977).

Where secured party conducts public sale of repossessed chattels having no market value, after advertising and notifying all interested parties, his good faith purchase of such chattels after no bidders appear is not sufficient of itself to establish that sale was not made in commercially reasonable manner. *Northern Fin. Corp. v. Kesterson*, 31 Ohio App. 2d 256, 287 N.E.2d 923 (1971).

23. —Private sale.

Where debtor was notified that automobile (collateral) would be sold at private sale, and secured party displayed automomobile in public place (secured party's automobile sales lot) with a "for sale" sign on it, debtor could not successfully contend that notice of sale was not in compliance with UCC § 9-504(3), since private offers were taken for the vehicle and it was sold privately. In such case, fact that vehicle was displayed for sale in public place did not make sale a public sale. *Lloyd's Plan, Inc. v. Brown*, 268 N.W.2d 192 (Iowa 1978).

In action to recover deficiency judgment for breach of retail instalment contract for purchase of second-hand front end loader, following resale of loader after buyer's default, where seller gave buyer oral notice of intention to place loader back on its lot and offer it for sale, and where buyer knew where loader was located, why it was being sold and had three months to find buyer or bid on it himself, buyer's actual knowledge of expected sale was sufficient to constitute reasonable notice under UCC § 9-504(3) as sale was private sale of collateral in normal course of seller's business. *Bondurant v. Beard Equip. Co.*, 345 So. 2d 806 (Fla. App. 1977).

Since secured creditor had right under UCC § 9-503 to repossess collateral upon default, repossession by agent of creditor was not conversion, even though repossession was without notice, and private sale of repossessed collateral was not conversion, even though sale was not commercially reasonable as required by UCC § 9-504. *Thurmond v. Elliott Fin. Co.*, 141 Ga. App. 574, 234 S.E.2d 153 (1977).

Where seller of automobile repossessed after buyer breached contract, repaired automobile and placed it on lot for sale in ordinary course of business as automobile dealer, such sale was a private one, and not one made at auction or by way of competitive bidding; thus, notice requirements of UCC § 9-504(3) were satisfied by notice to buyer of time after which collateral was to be sold. *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

Secured party had right to take possession of hay and sell it at private sale pursuant to UCC § 9-504, although it was disputed whether notice occurred in September or October of 1968, where debtor had sufficient notice to allow him to take

steps to protect his interest in the hay prior to its sale in December 1968 and January 1969. Oral notice was sufficient to meet requirements of UCC § 9-504(3). *Fairchild v. Williams Feed, Inc.*, 169 Mont. 18', 544 P.2d 1216, 11 A.L.R.4th 235 (1976).

Private sale of repossessed furniture was not commercially reasonable under UCC § 9-504(3) where secured party purchased repossessed furniture himself after he had decided what it would bring on resale and where, although time was not of essence, secured party only contacted one dealer to attempt sale; furthermore, secured party was not authorized to buy at private resale under § 9-504(3) since repossessed furniture was not of type customarily sold in recognized market nor subject to widely distributed standard price quotations. *Luxurest Furn. Mfg. Co. v. Furniture Whse. Sales, Inc.*, 132 Ga. App. 661, 209 S.E.2d 63 (1974), rev'd on other grounds sub nom. *Gurwitch v. Luxurest Furn. Mfg. Co.*, 233 Ga. 934, 214 S.E.2d 373 (1975), vacated 134 Ga. App. 528, 215 S.E.2d 292 (1975).

Where testimony was in substantial agreement that there was no widespread market for used restaurant equipment, particularly kind specifically designed for use of particular franchise, and all parties testified that they knew of no standard price quotations for such equipment, such collateral was not of type that could have been validly purchased by secured party at private sale under UCC § 9-504(3) and such purchase by secured party violated UCC §§ 9-501 and 9-507. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Secured party who purchased collateral at private sale failed to comply with UCC § 9-504(3) and was not entitled to deficiency judgment against debtors where collateral consisted of fixtures used in restaurant business and, thus, was not collateral of type customarily sold in recognized market or type which was subject of widely or regularly distributed standard price quotations; furthermore, language of security agreement, which provided that secured party could purchase collateral at private sale, constituted antecedent waiver of provisions of UCC § 9-504(3), in violation of UCC § 9-501(3) and

was, therefore, contrary to public policy and void. *Barber v. LeRoy*, 40 Cal. App. 3d 336 (2d Dist. 1974).

24. Debtor's remedies.

The failure to give a debtor notice of sale when required under subd (3) of this section does not completely discharge his obligation to pay any resulting deficiency, but he has the right to recover from the secured party any loss occasioned by the failure to give notice. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Debtor who alleged that secured party had sold repossessed collateral without sending debtor notice required by UCC § 9-504(3), but who did not show that collateral was consumer goods or that he had sustained identifiable loss as result of secured party's failure to notify, was not entitled to penalty imposed by UCC § 9-507(1) for such failure to notify. *Hensley v. Lubbock Nat'l Bank*, 561 S.W.2d 885 (Tex. Civ. App. 1978).

A cause of action based upon the claim that a sale of pledged collateral was made under circumstances which were not commercially reasonable in violation of subdivision (3) of section 9-504 of the Uniform Commercial Code is not an action to recover on a liability imposed by statute within the meaning of CPLR 214 (subd 2) requiring that such actions be commenced within three years, since the duty to conduct a commercially reasonable sale of pledged property exists apart from statute under the general maxims of equity and in order for the three-year limitation to attach the liability must be one which would not exist but for statute. *Sumner v. Century Nat'l Bank & Trust Co.*, 92 Misc. 2d 726 (1978).

Secured party's failure to give debtor notice of time and place of sale of collateral, as required by UCC § 9-504(3), will not release debtor from any deficiency that may exist after the sale. In such case, however, debtor under UCC § 9-507(1) may receive credit or recover damages for any loss that he sustained as result of such failure to notify. *Zions First Nat'l Bank v. Hurst*, 570 P.2d 1031 (Utah 1977).

In action by federal Small Business Administration for deficiency judgment on note following sale of collateral which was security for note, allowance of debtor's counterclaim for damages under UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) by selling collateral in commercially unreasonable manner would be sustained where evidence sufficiently showed, among other things, that sale had been inadequately advertised and that collateral had been sold for \$20,000, even though creditor had assessed its value at nearly \$90,000 six months before the sale. In such case, moreover, since remedy provided in UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) precluded debtor from setting up bar to deficiency judgment for creditor, deficiency judgment obtained by creditor would also be sustained. *Barbour v. United States*, 562 F.2d 19 (10th Cir. Kan. 1977).

Failure of secured party after repossession of automobile to give debtor notice of private sale as required by UCC § 9-504(3) did not work absolute forfeiture of debtor's indebtedness to secured party, since security agreement provided that debtor would be liable for deficiency after application of proceeds of sale as provided by UCC § 9-504(2); failure to give notice did, however, entitle debtor to recover from secured party any actual loss caused by such failure and, in case of sale of consumer goods such as automobile, debtor also had right to recover "amount not less than the credit service charge plus ten per cent (10%) of the principal amount of the debt or the time price differential plus ten per cent (10%) of the cash price" pursuant to UCC § 9-507(1). Furthermore, failure to give required statutory notice imposed upon creditor burden of establishing that sale was made in conformity with "reasonable commercial practices" as required by UCC § 9-507(2) and that sum received for chattel represented its fair market value. *Walker v. V.M. Box Motor Co.*, 325 So. 2d 905 (Miss. 1976).

Even if secured party failed to comply with provisions of UCC § 9-504(3), debtor would not be discharged from all liability under contract, but would rather be en-

titled under UCC § 9-507(1) to recover for damages caused thereby. *Stanchi v. Kemp*, 48 A.D.2d 973 (3d Dep't 1975).

Secured party's failure to dispose of repossessed collateral in commercially reasonable manner as required by UCC § 9-504(3) does not result in forfeiture of right to deficiency, but only requires that amount of claimed deficiency be reduced by amount of any loss occasioned by its failure to sell in commercially reasonable manner; if sale is not conducted according to UCC, amount received is not evidence of market value of collateral and secured party has burden of proving market value by other evidence. *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 87 N.M. 451, 535 P.2d 1077, 10 A.L.R.4th 404 (1975).

Evidence did not support alleged violation of § 9-504, where creditor gave formal written notice of intended private sale of corporate stock held as collateral and there was no allegation that stock was sold for less than its true value. *Dopp v. Franklin Nat'l Bank*, 461 F.2d 873 (2d Cir. N.Y. 1972), on remand, 374 F. Supp. 904 (S.D.N.Y. 1974).

Creditor may obtain deficiency judgment despite failure to comply fully with requirement of Code § 9-504(3), and in such instances debtor's relief is limited to rights set forth in Code § 9-507(1). *Lincoln Rochester Trust Co. v. Howard*, 75 Misc. 2d 181 (1973).

Direct effect of sale that is not commercially reasonable under Code § 9-504 is to alter measure of deficiency, and in such case fair and reasonable value of collateral as of time of sale is offset against balance due on security agreement. *Cornett v. White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973).

Where secured party and cosigner of note failed after repossession of collateral to proceed in accordance with UCC provisions for disposition of collateral upon default, debtor was entitled to recover as damages value of security less debt. *Farmers State Bank v. Otten*, 87 S.D. 161, 204 N.W.2d 178 (1973).

There is nothing in UCC § 9-504 to prohibit a pledgee of promissory notes payable to the order of its own obligor from selling the notes should that obligor

default, and the obligor does not have standing to complain if the purchaser is the original maker of the notes, since, regardless of who buys the notes, the original pledger loses his title to them and the right to receive payment thereon. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972).

Where debtor did not own collateral but had only a security interest therein, lower court erred in awarding debtor full value of collateral where debtor was entitled to right to immediate possession and could maintain replevin action therefor. *Brandywine Lanes, Inc. v. Pittsburgh Nat'l Bank*, 220 Pa. Super. 363, 284 A.2d 802 (1971).

25. Burden of proof.

Although North Carolina UCC § 9-504(3) does not address the question of burden of proof, a creditor, when suing for a deficiency judgment, nevertheless has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. Likewise, in an action by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979).

Plaintiff bank, which made a corporate loan for the purchase of two mechanical devices used in the manufacture of elevator equipment, the loan being secured by a chattel mortgage on the purchased equipment, a contract of repurchase of the equipment by the seller of the equipment at a reduced purchase price and the personal guarantees of the three defendants who formed the corporation and were the sole stockholders, and which then, upon default and repossession of the equipment, did not seek to enforce the agreement of repurchase, but instead hired the seller of the equipment to act as its agent for the purpose of selling the repossessed equipment, which the seller purchased for itself at the foreclosure sale and then later resold at a profit, is not entitled to a deficiency judgment against defendants since plaintiff failed to sustain its burden of proof of "reasonable notification" of sale to the debtor corporation and that "the

method, manner, time and terms" of the disposition were "commercially reasonable". (Uniform Commercial Code, § 9-504.) Although the mere fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a "commercially reasonable" manner, defined as the disposition of security "made in the good faith attempt to dispose of the collateral to the parties' mutual best advantage", where, however, marked discrepancies between the disposal and sale prices signal a need for closer scrutiny, especially where the possibility for self-dealing is substantial, the creditor should be denied a deficiency judgment in the absence of some affirmative showing that the terms of the disposition were in fact commercially reasonable. Since plaintiff offered no proof of the "fair value" of the security either at the time of repossession or sale, there is no need to determine if a creditor has the optional alternative of recovering a deficiency judgment "by proving the amount of the debt, the fair value of the security and the resulting deficiency". (See *Security Trust Co. v. Thomas* (1977, 4th Dist) 59 AD2d 242, 399 NYS2d 511, 22 UCCRS 1305.) *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), *aff'd*, 70 A.D.2d 786 (4 Dep't 1979).

The secured party has the burden of showing that the sale of repossessed collateral was commercially reasonable, as required by UCC § 9-504(3). This burden may not be satisfied without affirmatively establishing that the terms of the sale were commercially reasonable. This, in turn, requires the secured party to show that the sale price was the fair and reasonable value of the collateral. *Vines v. Citizens Trust Bank*, 146 Ga. App. 845, 247 S.E.2d 528 (1978).

In action for deficiency judgment, assignee of note and security agreement executed on sale of truck, which was repossessed on debtor's default and sold for \$400 more than black-book listing therefor, sustained burden of proof that sale was commercially reasonable under UCC § 9-504(3) where agreed statement of parties recited that assignee had obtained

fair price for vehicle at its sale following repossession. *Jackson County State Bank v. Williams*, 1 Kan. App. 2d 649, 573 P.2d 1092 (1977).

Duty of secured party in selling collateral under UCC § 9-504(3) is to obtain best possible price therefor for benefit of debtor. However, secured party does not have to use extraordinary means to accomplish this result, and ordinarily proof that price obtained was fair-market value of collateral will be sufficient. *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977).

Secured party, who had burden under UCC § 9-504(3) of proving that every aspect of public sale of collateral after debtor's default was commercially reasonable, failed to meet such burden where (1) notice of sale listed property to be sold, but did not state where it could be inspected by prospective buyers; (2) such notice was published only by delivering copies thereof to General Services Administration and to clerks of state courts for posting, and was not published in any newspaper of general circulation in area where equipment was sold; (3) secured party did not solicit bids from any persons who would likely have been interested in buying the property, such as dealers, contractors, and oil companies; (4) secured party did not establish that sale was in conformity with reasonable commercial practices among dealers in that type of property; (5) secured party was only bidder at sale; (6) secured party purchased property for only \$10,000, although it had sold such property to debtor 14 months before for more than \$55,000; and (7) secured party six weeks later resold property to third person for \$25,000. *Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank Constr. Co.-Alaska*, 568 P.2d 1007 (Alaska 1977).

Secured creditor who has liquidated his security may maintain action for deficiency judgment, but such secured creditor has burden to prove that due notice of sale as provided by law was given to debtor and that sale was commercially reasonable. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Because UCC definition of "commercially reasonable" sale is vague, and be-

cause reasonableness of sale of debtor's collateral generally depends on circumstances of each case, whether sale of collateral was held in commercially reasonable manner, as required by UCC § 9-504(3), is question of fact as to which secured creditor has burden of proof. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Evidence raised sufficient question concerning notice of location of foreclosure sale and the sale's commercial reasonableness under UCC § 9-504 so as to warrant injunction to preserve status quo until resolution of issue at trial, where evidence indicated that notice of sale specified "door of the Courthouse" which was uniformly interpreted as meaning the south door, that no foreclosure sale had ever been conducted at any other courthouse door, that notice of sale was posted at the south door but not at the north door, that persons attempting to serve restraining order went to south door, but that sale was conducted at the north door. *Jones v. Garcia*, 538 S.W.2d 492 (Tex. Civ. App. 1976).

Creditor's default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor's failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Under UCC §§ 9-504 and 9-507(2), where individual's guaranty of corpora-

tion's demand notes specifically authorized sale of collateral without notice to or further assent from guarantors, sale of collateral was approved by corporation's referree in bankruptcy and no objection was made by trustee in bankruptcy or guarantor at time of sale, naked assertion of impropriety in sale could not overcome presumption that sale of collateral was effectuated in commercially reasonable fashion. *First Nat'l City Bank v. Cooper*, 50 A.D.2d 518 (1st Dep't 1975).

Secured party failed to sustain its burden of proving that disposition of collateral was commercially reasonable, as required by UCC § 9-504(3), where it sold repossessed automobile, which had been purchased for over \$1600 some three months earlier, for \$300 at auction sale which had been advertised once, and where possibilities for self-dealing were substantial; thus, secured party was barred from recovering deficiency under UCC § 9-504(2). *Central Budget Corp. v. Garrett*, 48 A.D.2d 825 (2d Dep't 1975).

Commercial reasonableness of sale is conclusively presumed if secured party substantially complies with part 6 of Article 9 of North Carolina's UCC. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109 (1972), cert. denied, 282 N.C. 426, 192 S.E.2d 836 (1972).

When reasonableness of sale is challenged the plaintiff has the burden of proof respecting such issue. *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659 (W.D. Okla. 1972).

Creditor, in action for deficiency judgment after sale of accounts given as security, failed to prove commercial reasonableness of sale; held, burden of proof on issue having been placed on debtor, creditor could not further litigate issue. *Investors Acceptance Co. v. James Talcott, Inc.*, 61 Tenn. App. 307, 454 S.W.2d 130 (1969).

C. Notice.

26. In general; scope.

While § 75-9-504(3) does not require actual notice, but only reasonable notice, a creditor has a duty to make an additional good faith effort to notify the debtor where the creditor knows that the debtor has not received notice. *Fidelity Fin. Servs., Inc. v.*

Stewart, 608 So. 2d 1111 (Miss. 1992), on rehearing, (Miss. 1992).

Creditor's notice of public sale of collateral was sufficient under UCC § 9-504(3) to inform reasonable business persons of place of sale where (1) such notice was sent to debtor's office in Dallas, Texas; (2) creditor's attorney, who signed notice, gave Houston, Texas address and phone number; (3) address of place of sale was given as "11601 North Houston-Rosslyn Road," although name of city (Houston) in which sale was to take place was not given; (4) name of owner of property to be sold was listed on notice as "Compression, Inc. of Houston, Texas"; and with owner of place in Houston, Texas where sale was conducted and thus had not been misled by failure of notice to state that place of sale was located in Houston, (5) that property had been brought to Houston, where demand for it was greatest, (6) that creditor had obtained property for \$100,000 and had later resold it for the same price, (7) that property's subsequent purchaser had refabricated it at some expense and ultimately had obtained only \$140,000 for it, (8) that demand at time of sale for that type of property was not great, and (9) that property's fair-market value (\$150,000) did not render its sale price (\$100,000) grossly inadequate. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), ref. n.r.e (Dec. 6, 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

UCC § 9-504(3) is not applicable to sale of collateral by receiver appointed by court of equity, in case where receiver failed to give debtor timely and proper notice of such sale, since sale was made under court order that the court subsequently confirmed. *Sands v. Citizens & S. Nat'l Bank*, 146 Ga. App. 853, 247 S.E.2d 544 (1978).

Sale of collateral was not commercially reasonable under UCC § 9-504(3) where secured creditor, after debtor's default and after giving debtor notice of intended sale

of collateral, which sale was never consummated because bids received were insufficient, sold collateral at second sale but failed to give debtor notice of second sale, as required by UCC § 9-504(3). *Savings Bank v. Booze*, 34 Conn. Supp. 632, 382 A.2d 226 (1977).

Holder of security interest in both real and personal property who chose upon debtors' default to proceed under UCC § 9-504(1) by repossessing and selling inventory without judicial process was bound by UCC § 9-504(3) requirement that notice of sale be given. *Hildner v. Fox*, 17 Ill. App. 3d 97, 308 N.E.2d 301 (1st Dist. 1974).

Failure to give notice as required by paragraph (3) of this section does not bar the plaintiff from recovery. *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964).

27. Timeliness.

Where secured party mailed notice to debtor on Wednesday of intention to dispose of collateral by private sale the following Monday, such notice was not commercially reasonable under UCC § 9-504(3) as it did not provide debtor minimum of three business days to arrange to protect interest in collateral. *First Nat'l Bank v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977). But see *Old Mill Toyota, Inc. v. Schroder*, 3 N.C.A. 953 (Neb. App. 1993).

Secured party failed to give reasonable notice of sale of repossessed mobile home, where notice of private sale to be held on April 10 was mailed to debtor on April 7 and received by him on April 8, and April 9 was holiday. *Prairie Vista, Inc. v. Casella*, 12 Ill. App. 3d 34, 297 N.E.2d 385 (4th Dist. 1973).

28. Manner of method.

Under UCC § 9-504(3), requiring that notice of intended sale of collateral must be "sent" to debtor, and § 1-201(38), defining word "send," notification of the sale must be in writing. Such written notice will be sufficient under UCC § 9-504(3) if it is either personally delivered to the debtor or sent by mail to the debtor's address. In the latter case, whether or not the debtor receives it will not defeat its

sufficiency. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Where secured party's notice of public sale of automobile (the collateral) was posted on two utility poles in two alleys, and also on side of building but nowhere else, manner in which secured creditor gave notice to public of impending "public sale" of vehicle was so woefully inadequate that it, as matter of law, was not commercially reasonable under UCC § 9-504(3). *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

Under UCC § 9-504(3), requiring that reasonable notification of time and place of any public sale of collateral must be sent by secured party to debtor, while word "sent" implies notice sent by mail, all that it actually requires is actual or constructive receipt of notice. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Local newspaper publication a week before sale, with copy of publication being mailed to defendant the day after publication, constituted reasonable notification of sale within UCC § 9-504(3), even though defendant twice refused delivery of mailed notice. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

UCC § 9-504(3) requires more than a general advertisement or a reasonable expectation on the part of the debtor if the notice requirement is to be satisfied. *People v. Brown*, 131 Ill. App. 2d 717, 263 N.E.2d 603 (3d Dist. 1970).

Although only reasonable notification of the time after which a private sale will be made is required, oral notice of a sale to the highest bidder without the specification of any time cannot be said to constitute reasonable notice. *Barker v. Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968).

The Code is silent as to the form of the notice of foreclosure of the collateral and does not state that it must be in writing, or whether it should be given by hand or by registered mail. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

29. —Mailing.

Where secured party mailed notice to debtor on Wednesday of intention to dispose of collateral by private sale the fol-

lowing Monday, such notice was not commercially reasonable under UCC § 9-504(3) as it did not provide debtor minimum of three business days to arrange to protect interest in collateral. *First Nat'l Bank v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977). But see *Old Mill Toyota, Inc. v. Schroder*, 3 N.C.A. 953 (Neb. App. 1993).

Bank dealt with collateral securing promissory note in commercially reasonable manner, where, after defendant had paid only five monthly installments on note, bank sent notice, which met requirements of UCC § 9-504(3), to defendant by registered mail stating that collateral would be sold at public sale, and thereafter proceeded with commercially reasonable public sale. *Bank of Josephine v. Hopson*, 516 S.W.2d 339 (Ky. 1974).

Conditional seller's notification by certified mail to buyer or his intention to resell repossessed truck was sufficient, and fact that buyer had no actual knowledge of resale is immaterial. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Assignee of security agreement covering conditional sale of auto used certified mail, return receipt requested, to give maker of agreement notice of impending sale; held, this was reasonable notice, notwithstanding maker's testimony disclaiming receipt or knowledge of notice. *Steelman v. Associates Disct. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970).

30. —Mailing; undelivered or unclaimed.

Secured party did not satisfy notice requirements of California version of UCC § 9-504(3), and was therefore precluded from recovering deficiency judgment from debtor, where secured party mailed certified letter addressed to debtor, return receipt requested, where notice was returned unclaimed before sale, and where secured party made no further attempt to notify debtor, although its officers knew his whereabouts and had business dealings with him through branch office. In re *Carter*, 511 F.2d 1203 (9th Cir. Cal. 1975).

Where (1) secured party, on debtor's default in making payments on car, ob-

tained document from debtor in which debtor waived notice of secured party's intended sale of car, (2) secured party, on October 12, 1976, sent letter to debtor by certified mail advising debtor that he could redeem car before such sale, (3) on learning that letter had not been received by debtor, secured party sent debtor second letter on October 19, 1976, which justified debtor's belief that he had until October 29, 1976 to redeem car, and (4) secured party sold car on October 25, 1976, court held (1) that UCC § 9-501(3)(b) prohibited waiver of notice to debtor, which is required by UCC § 9-504(3), of intended sale of car, (2) that even if it could be assumed, despite prohibition contained in UCC § 9-501(3)(b), that debtor had waived his right to such notice, secured party's attempted sending of notice to debtor by certified mail on October 12, 1976 operated as an abandonment of such waiver, (3) that such abandonment was reinforced by secured party's second notice to debtor on October 19, 1976, and (4) that debtor had right to rely on statements in second notice that he could redeem car until October 29, 1976. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Where (1) after lessee's default, lessor repossessed collateral (leased forklift) and pursuant to UCC § 9-504(3) sent debtor certified letter of notice to address listed on leasing agreement that collateral would be sold, and (2) such letter was marked "unclaimed" and returned to lessor, lessee in action for deficiency judgment after sale of collateral could not successfully contend, in light of UCC § 1-201(26) concerning what constitutes giving of notice and § 1-201(38) concerning sending notice by mail, that lessee was required to receive such notice, and that if it did not receive it, no deficiency judgment could be awarded. *MFT Leasing v. Fillmore Prods., Inc.*, 579 P.2d 924 (1978).

Sufficient notice of private sale of collateral is given under UCC § 9-504(3) when creditor takes such steps as are reasonably required to inform debtor in ordinary course, whether or not debtor actually receives such notice. *Lloyd's Plan, Inc. v. Brown*, 268 N.W.2d 192 (Iowa 1978).

Evidence failed to determine with certainty that reasonable notification re-

quired by UCC § 9-504(3) of sale of collateral was given to debtor where creditor testified that notice allegedly given was contained in letter sent by certified mail that was returned unclaimed, debtor testified that he did not receive such letter, and evidence did not show whether letter was returned before or after sale. *Citizen & S. Nat'l Bank v. Morgan*, 142 Ga. App. 337, 235 S.E.2d 767 (1977).

In suit for deficiency judgment against purchaser of boat and trailer who defaulted in making payment under retail instalment contract reserving security interest in seller, seller was not entitled to summary judgment where notice of private sale of security was sent to debtor by registered mail and was returned "unclaimed," because debtor is entitled to "reasonable notification" under UCC § 9-504(3) to protect his interests at sale or to redeem under UCC § 9-506 prior to sale; duty of good faith imposed under UCC § 1-203 and defined by UCC § 1-201(19) was not satisfied where notice was sent under UCC § 1-201(38) almost 4 months before sale was held and secured creditor was not entitled to summary judgment without showing of whether notice was returned prior to or after sale. *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974).

Where finance company's registered letter addressed to conditional buyer which purported to give notice of the time, place, and terms of sale of repossessed automobile was returned undelivered, and finance company made no further effort to give the notice required by subsection (3) although it had information as to where the buyer's parents lived and where he was employed, the provisions of the subsection with respect to notice were not complied with, and the sale of the automobile was commercially unreasonable. *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

31. Form.

The Code is silent as to the form of the notice of foreclosure of the collateral, and does not state that it must be in writing. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

32. Sufficiency.

Where (1) certified letters were mailed to debtor and each guarantor advising

them that collateral had been repossessed, that they had right of redemption, and that if such right were not exercised by specified date, collateral would be sold, and (2) where such letters were followed by other letters informing debtor and guarantors that collateral had been advertised for sale, court held that such notice of sale of collateral was commercially reasonable and sufficient under UCC § 9-504(3) and UCC § 1-201(26). *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978).

Jury finding that creditor had conducted public sale of collateral in commercially reasonable manner required by UCC § 9-504(3) was supported by evidence which showed (1) that creditor had advertised sale for two days in Houston, Texas daily newspaper, (2) that it had mailed notices to 19 used-equipment companies, (3) that prospective purchaser from Oklahoma City, Oklahoma, who received one of the mailed notices, had come to Houston and inspected the property, (4) that all but two of the used-equipment companies notified by the creditor had done business (5) debtor produced no evidence that it did not understand or could not deduce place of sale from notice and also failed to show that it had been prejudiced by omission of "Houston, Texas" from address of place of sale. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), ref. n.r.e (Dec. 6, 1978).

Notice to debtor of secured party's proposed disposition of collateral is sufficient under UCC § 9-504(3) where (1) secured party notified debtor that pursuant to UCC § 9-504 and § 9-506, secured party would sell collateral within ten days; (2) such notice also informed debtor about manner of sale, distribution of sales proceeds, and accounting to debtor for any surplus or the seeking of any deficiency; and (3) notice granted debtor ten days to redeem collateral by satisfying indebtedness defaulted on. *Georgia Grain & Stillage Co. v. First Ga. Bank*, 142 Ga. App. 709, 236 S.E.2d 913 (1977).

33. —Public sale.

Where (1) creditor, after debtor's default in making payments on two trucks, sent debtor notice in April, 1975 that trucks would be sold at private sale after time

specified in May, 1975, (2) trucks were sold at time specified in such notice, but sale was public and not private, (3) creditor purchased trucks at such sale for amount equal to expenses of conducting sale, and (4) creditor, nine months later, sold trucks at private sale and sued debtor for deficiency judgment for unpaid balance due on trucks, court held (1) that first sale of trucks, which was public sale, was invalid under UCC § 9-504(3) because notice thereof did not specify time and place of sale, (2) second sale of trucks nine months later at private sale was valid because notice thereof, which had been sent to debtor in April, 1975, constituted reasonable notification under UCC § 9-504(3), provided that test of commercial reasonableness of such sale could be met, and (3) even if at trial of case it should be found that creditor had not conducted sale in commercially reasonable manner, creditor was not thereby deprived of right to deficiency judgment, since debtor under UCC § 9-507(1) could offset any loss sustained as result of creditor's failure to conduct sale in commercially reasonable manner against any deficiency judgment that creditor might obtain. *Associates Fin. Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer's intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable

notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting "commercially reasonable" disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their prior course of dealing and their conduct in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

34. —Private sale.

Where (1) creditor, after debtor's default in making payments on two trucks, sent debtor notice in April, 1975 that trucks would be sold at private sale after time specified in May, 1975, (2) trucks were sold at time specified in such notice, but sale was public and not private, (3) creditor purchased trucks at such sale for amount equal to expenses of conducting sale, and (4) creditor, nine months later, sold trucks at private sale and sued debtor for deficiency judgment for unpaid balance due on trucks, court held (1) that first sale of trucks, which was public sale, was invalid under UCC § 9-504(3) because notice thereof did not specify time and place of sale, (2) second sale of trucks nine months later at private sale was valid because notice thereof, which had been sent to debtor in April, 1975, constituted reasonable notification under UCC § 9-504(3), provided that test of commercial reasonableness of such sale could be met, and (3) even if at trial of case it should be found that creditor had not conducted sale in commercially reasonable manner, creditor was not thereby deprived of right to deficiency judgment, since debtor under UCC § 9-507(1) could offset any loss sustained as result of creditor's failure to conduct sale in commercially reasonable manner against any deficiency judgment that creditor might

obtain. *Associates Fin. Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978).

Where seller of automobile repossessed after buyer breached contract, repaired automobile and placed it on lot for sale in ordinary course of business as automobile dealer, such sale was a private one, and not one made at auction or by way of competitive bidding; thus, notice requirements of UCC § 9-504(3) were satisfied by notice to buyer of time after which collateral was to be sold. *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

In action by bank to recover balance due on promissory note signed by debtor to secure purchase of automobile, trial court erred in directing verdict for bank where bank admittedly did not comply with notice requirements of UCC § 9-504 in telling debtor only that car was to be sold at private sale without mention of specific date, and bank's assertion that debtor's statement that he knew car had been repossessed and debtor's surrender of keys to seller of automobile amounted to admission that debtor had notice that after that time car was subject to private sale did not justify court's ruling that debtor was estopped from asserting lack of notice where testimony conflicted as to whether debtor was told of sale and signed over title before or after sale occurred. *Wheless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974).

35. —Actual notice.

In action to recover deficiency judgment for breach of retail instalment contract for purchase of second-hand front end loader, following resale of loader after buyer's default, where seller gave buyer oral notice of intention to place loader back on its lot and offer it for sale, and where buyer knew where loader was located, why it was being sold and had three months to find buyer or bid on it himself, buyer's actual knowledge of expected sale was sufficient to constitute reasonable notice under UCC § 9-504(3) as sale was private sale of collateral in normal course of seller's business. *Bondurant v. Beard Equip. Co.*, 345 So. 2d 806 (Fla. App. 1977).

The receipt or acquisition of actual knowledge within the time a properly sent notification could have arrived amounts to

compliance with the requirement of UCC § 9-504(3), even absent a writing. *Crest Inv. Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972).

Debtor's knowledge that repossessed auto would be sold to satisfy indebtedness did not constitute reasonable notification of time after which creditor could make private sale of auto. *Nelson v. Monarch Inv. Plan, Inc.*, 452 S.W.2d 375 (Ky. 1970).

36. —Constructive notice.

The requirement that a guarantor of a secured party receive the same notice of sale of the collateral as the debtor is entitled to receive (Uniform Commercial Code, § 9-504, subd [3]), is satisfied, where the notice of the dispositional sale of the corporate debtor's assets can properly be imputed to defendant guarantor by reason of her position as the secretary of the small, closely owned and family-operated corporation whose indebtedness she guaranteed. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Notice to corporation president of private sale of repossessed equipment could not be imputed to corporate officers who were accommodation indorsers of note where president was also officer of repossessing equipment supplier, and where reposessor, although aware of this probability of conflict of interest, had not taken "such steps as may be reasonably required to inform the other party in the ordinary course". *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

37. Parties entitled to notice.

An automobile dealer who sells a conditional sales contract to a bank and at the same time executes an assignment which provides that in the event of default he will repurchase the contract for the unpaid balance is a debtor of the bank as defined in ¶ (d) of subd (1) of § 9-105, and where the bank, after repossession, sells the security at private sale without notice to the dealer, subd (3) of this section is not complied with. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Where (1) seller sold computer system under purchase agreement which provided that seller would retain security interest in goods until balance of purchase price was paid, (2) buyer, after taking possession of goods on January 14, 1975, advised seller on January 30, 1975 to repossess them for seller's protection because buyer was in financial difficulty, and (3) seller, after repossessing goods on February 3, 1975, subsequently returned part of them to seller's new-equipment inventory without separately identifying such goods from goods already in inventory and also, without notifying buyer, resold some of the repossessed goods to third persons, court held (1) that seller was limited to remedy of security-interest holder under UCC § 9-504, which governed seller's right to repossess the goods in suit, dispose of them, and apply their proceeds, and (2) that because seller, on reselling some of the goods after their repossession, had failed to give buyer notice of sale required by UCC § 9-504(3), seller under California construction of UCC § 9-504(3) could not recover deficiency on unpaid purchase price from buyer. *Nixdorf Computer, Inc. v. Jet Forwarding, Inc.*, 579 F.2d 1175 (9th Cir. Cal. 1978).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding

that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Where assignee (secured party) of equipment lease of drilling machine, on default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to deficiency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

In action by debtor for creditor's wrongful repossession and conversion of collateral, evidence of value of collateral at time it was sold, where creditor did not give debtor notice of sale required by UCC § 9-504(3), was relevant because it went toward proof of conversion. *Ott v. Fox*, 362 So. 2d 836 (Ala. 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months, was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of lessee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1), (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling

repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession charges. *Avis Rent-A-Car Sys. v. Franklin*, 82 Misc. 2d 66 (1975).

Plaintiff was entitled to notification of public sale of collateral in which both plaintiff and bank had security interest, and bank was therefore liable for any damages which plaintiff sustained by bank's failure to provide such notice, where property described in plaintiff's financing statement reasonably identified collateral, and where such financing statement was therefore sufficient to put bank on notice of plaintiff's claim. *Stephens v. Bank of Camilla*, 133 Ga. App. 210, 210 S.E.2d 358 (1974), *aff'd*, 234 Ga. 293, 216 S.E.2d 71 (1975).

Where the corporate maker dishonors the note, a corporate officer who had signed as indorser becomes a debtor entitled to notice under UCC § 9-504. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

38. —Accommodation parties.

Although bank was permitted to dispose of repossessed automobile without judicial process or notice to co-signer of installment sales contract, bank was not entitled under UCC § 9-504(3) to deficiency judgment against co-signer, where bank failed to give notice to co-signer of intended sale of repossessed automobile. *Washington v. First Nat'l Bank*, 332 So. 2d 644 (Fla. App. 1976).

Secured party was not entitled to recover deficiency judgment from cosigner of note where collateral securing note was repossessed and sold without notice to cosigner. *First State Bank v. Northrop*, 519 S.W.2d 161 (Tex. Civ. App. 1975).

Secured creditor who took possession of collateral, solicited bids, and sold it at private sale was not entitled to recover deficiency judgment against accommodation maker of note where no notice of private sale was given to accommodation party prior to completion of sale as required by UCC § 9-504(3); accommodation maker who signed note to enable makers of note to secure loan from secured party was debtor within meaning of UCC § 9-504(3), and was, thus, entitled to

notice of sale. *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974).

Accommodation indorsers are "debtors", entitled to notice from secured party of private sale of ice cream business equipment which was collateral on promissory note. *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

39. —Guarantor.

Where assignee (secured party) of equipment lease of drilling machine, on default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to deficiency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved

corporation in present case), and a “debtor” under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat’l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Where bank upon default of note and commercial equipment security agreement sold collateral without giving notice to guarantors, under UCC § 9-504(3) failure of secured party to give requisite notice prior to sale or disposition of collateral precluded action for deficiency against guarantor. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Although plaintiff was not guarantor of loan to corporation, having been released from personal liability on loan, where plaintiff’s stock still secured corporate debt and, in event of deficiency, stock was subject to sale, plaintiff was “debtor” to whom notice was owed under UCC § 9-504(3); although creditor failed to give notice prior to sale of collateral, creditor was entitled to collect deficiency if he could prove market value of collateral. *Rushton v. Shea*, 423 F. Supp. 468 (D. Del. 1976).

Guarantors of promissory note secured by collateral were “debtors” within meaning of UCC §§ 9-105(1)(d) and 9-504(3) and were entitled to reasonable notification prior to disposition of collateral by secured party; failure to provide such notice precluded entry of deficiency judgment in action by secured party against guarantors. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. App. 1975).

A guarantor of payment of a secured party is entitled to the same notice of sale of the collateral as the debtor is entitled to (Uniform Commercial Code, § 9-504, subd [3]) since a guarantor is a “debtor” within the meaning of section 9-105 (subd [1], par [d]) of the Uniform Commercial Code which does not require the “debtor” to be the owner or have rights in the collateral. The debtor is only required to be an “obligor in any provision dealing with the obligation”. It is imperative for the guarantor to receive notice of the dispositional sale in order to protect his

right to reduce his potential liability at the sale. Requiring the secured party to give notice to the guarantor of the disposition of the collateral will not cause the creditor to suffer any prejudice or impose an undue burden. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Guarantor is “debtor” within meaning of UCC § 9-105(1)(d) and § 9-504(3), and thus is entitled to notice of disposition of collateral. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Lease of restaurant equipment did not constitute security agreement and, hence, guarantors of lessee’s performance of terms of lease were not entitled to notice required by UCC § 9-504(3) where leased equipment was sold at private sale after lessee failed to pay rent and after demand for payment from guarantors had been ignored. *Diaz v. Goodwin Bros. Leasing, Inc.*, 511 S.W.2d 680 (Ky. 1974).

40. —Owner of collateral.

In creditor’s action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation’s obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation’s note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation’s note, court (1) affirmed trial court’s denial of plaintiff’s motion for deficiency judgment because of plaintiff’s failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a “debtor” under UCC § 9-504(3), insofar as

entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Since UCC § 9-504(3), requiring secured party to send debtor reasonable notification of sale of collateral, deals with both collateral and the underlying obligation, term "debtor" in UCC § 9-504(3) includes both owner of collateral and obligor when they are not the same person. *Commercial Dist. Corp. v. Bayer*, 57 Ill. App. 3d 295, 372 N.E.2d 926, 5 A.L.R.4th 1283 (1st Dist. 1978).

Notice requirement of UCC § 9-504(3) refers to collateral, not to obligation, and "debtor" entitled to notice by that provision is owner of collateral; thus, maker of note was not entitled to notice of sale where automobile given as security for note was owned by his cosigner. *New Haven Water Co. Emp. Credit Union v. Burroughs*, 6 Conn. Cir. Ct. 709, 313 A.2d 82 (1973).

41. —Waiver.

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-

504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Loan contract which contained provision for waiver of notice of sale of repossessed collateral in violation of UCC § 9-501(3)(b) and § 9-504(3) was not completely void, but merely contained unenforceable provision, where defendant lender did not foreclose on or sell any property of plaintiff debtor and waiver provision was not in any way involved in the litigation between the parties. *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors

and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Proper interpretation of UCC § 9-501(3)(b), which is in accordance with policy of UCC § 9-504 to protect rights of debtor, is that nonwaiver provision of UCC § 9-501(3) applies both before and after debtor's default. Thus, UCC § 9-501(3)(b) does not allow waiver by debtor of his right under UCC § 9-504(3) to reasonable notification of private sale of collateral after debtor's default on underlying obligation. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on "recognized market"; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Under UCC §§ 9-504 and 9-507(2), where individual's guaranty of corporation's demand notes specifically authorized sale of collateral without notice to or further assent from guarantors, sale of collateral was approved by corporation's referee in bankruptcy and no objection was made by trustee in bankruptcy or guarantor at time of sale, naked assertion of impropriety in sale could not overcome presumption that sale of collateral was effectuated in commercially reasonable

fashion. *First Nat'l City Bank v. Cooper*, 50 A.D.2d 518 (1st Dep't 1975).

42. Exceptions to notice requirement.

Code section requiring secured party to give reasonable notification to debtor of its intention to dispose collateral is made inoperative by Code § 9-501(4) with respect to watered stock foreclosed as part of real estate security. *Kinoshita v. North Denver Bank*, 181 Colo. 183, 508 P.2d 1264 (1973).

Forty-one head of cattle were not "perishable" or did not threaten to "decline speedily in value" within two weeks from date at which sale was scheduled until date sale was held, so as to excuse "reasonable notification" to junior lienholder as to time and place of sale as required by UCC § 9-504(3). *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

Failure to give notice to conditional buyer as required by paragraph (3) of this section was not excused in the absence of evidence that a repossessed second-hand pickup truck would threaten to decline speedily in value or was a type of property customarily sold on a recognized market. *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964).

43. —Sale on recognized market.

Bank which as secured creditor purchased collateral at private sale following debtor's default, but which did not comply with requirement of UCC § 9-504(3) that collateral purchased at private sale must be of type that is customarily sold in recognized market or is subject of widely distributed standard-price quotations, was not entitled to recover deficiency that existed after liquidation of collateral. *Jackson State Bank v. Beck*, 577 P.2d 168 (Wyo. 1978).

Creditor's default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor

was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor's failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on "recognized market"; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Reposessed automobiles are not collateral of type sold on recognized market within meaning of UCC provision requiring creditor to give debtor notice of sale of reposessed collateral. *Community Mgt. Ass'n v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973).

A used automobile is not collateral of a type customarily sold on a recognized market, and where it is sold by the holder of a security interest, notice to the debtor is not dispensed with. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

The debtor is not entitled to notice of the foreclosure sale of the collateral where it is of a nature customarily sold on a recognized market. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

44. —"Recognized market".

A "recognized market," as the term is used in subdivision (3) of this section might well be a stock or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation; and notice to the debtor of such sales is dispensed with only because the debtor would not be prejudiced by the want of notice. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

"Recognized market" refers to widely recognized stock and commodity exchanges which are regulated in some substantial way, but does not include automobile auctions; so that in absence of secured creditor's giving required notice of sale of reposessed automobile, creditor forfeits his right to any deficiency against any debtor not so notified. *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. App. 1973).

45. Evidence of burden of proof.

Although North Carolina UCC § 9-504(3) does not address the question of burden of proof, a creditor, when suing for a deficiency judgment, nevertheless has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. Likewise, in an action by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979).

Although secured party under UCC § 9-504(3) need not prove debtor's receipt of notice of sale of collateral, secured party

must show when notice was sent in order to permit determination to be made as to whether notice was sent within commercially reasonable time prior to date after which private sale of collateral would be made. *Commercial Disct. Corp. v. Bayer*, 57 Ill. App. 3d 295, 372 N.E.2d 926, 5 A.L.R.4th 1283 (1st Dist. 1978).

Secured creditor who has liquidated his security may maintain action for deficiency judgment, but such secured creditor has burden to prove that due notice of sale as provided by law was given to debtor and that sale was commercially reasonable. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

In action brought by secured creditor against maker and guarantor of note to recover deficiency alleged to be due on note after secured creditor sold collateral, summary judgment in favor of secured creditor was precluded by existence of factual issues concerning propriety of notice of sale and whether sale was conducted in commercially reasonable manner. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Secured party who (1) pursuant to UCC § 9-504(1) sold collateral (truck tractor) at private sale for \$1,000, although debtor had borrowed \$25,000 from secured party to buy collateral, (2) did not give debtor notice of sale required by UCC § 9-504(3), and (3) allegedly violated UCC § 9-504(3) by conducting sale in commercially unreasonable manner could maintain action against debtor and guarantor of debtor's note for deficiency judgment on debtor's obligation. However, in such case, secured party had burden of proving that due notice of sale had been given to debtor and that sale had been conducted in commercially reasonable manner. Furthermore, even if secured party should fail to present such proof at the trial, he could still recover deficiency judgment by proving amount of debt, fair value of collateral, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Compliance with UCC § 9-504(3) for notification as to disposition of collateral security is condition precedent to secured creditor's right to recovery under UCC § 9-507(1) of any deficiency between sale

price of collateral and amount of unpaid balance; burden is on secured party to plead and prove compliance with statutory requirement of notice and of reasonableness of notice. *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492 (Iowa 1977).

Secured parties failed to meet burden of proving compliance with "reasonable notification" requirement of UCC § 9-504(3) where secured parties sent notice of sale only to one out of two debtors by letter, on May 25, 1972, informing him that sale would be held on June 2, 1972, and where, before sale date, debtors moved to temporarily restrain sale to protect their interest in collateral, but secured parties conducted sale before court's order could be served. Furthermore, sale was not commercially reasonable where only people who attended sale were secured party and one of his former employees, where there was no evidence that secured parties publicized sale in any manner or otherwise took steps to insure best price possible would be obtained for benefit of debtor, secured party placed only bid at sale and purchased collateral for \$100, and where, subsequently, secured parties sold collateral to third party for \$10,000. Although it would be presumed that collateral had fair market value equal to amount of debt and no deficiency would be permitted unless creditor produced evidence to establish reasonable amount that collateral would have sold for at proper sale, and although secured parties had failed to conduct commercially reasonable sale with reasonable notification to debtors, there was substantial evidence that collateral had fair market value of \$10,000 and, thus, secured parties were entitled to deficiency judgment in amount equal to difference between balance owed on promissory note and fair market value of collateral. *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 560 P.2d 917 (1977).

In action by noteholder for deficiency after sale of collateral, noteholder had burden of proving defendant was given proper notice of sale within meaning of UCC § 9-504(3). Notice was misleading, inaccurate and unreasonable where automobile being sold was not present, where defendant was not given opportunity to bid, where no other potential purchasers

were present, where alleged "public sale" was held in Chicago law office while collateral was located in another city, and where bids were received at undisclosed price from undisclosed persons. *General Foods Corp. v. Hall*, 39 Ill. App. 3d 147, 349 N.E.2d 573 (1st Dist. 1976).

In action to recover deficiency judgment from debtor and guarantor after sale of property taken by bank under security instruments, where bank disposed of property in several transactions and in some of transactions failed to give notice of sale as required by UCC § 9-504(3) and in others failed to prove reasonableness of notice, i.e., notice should be sent in such time that debtors would have minimum of three business days to arrange to protect interests, failure to give notice barred recovery of deficiency judgment. *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). But see *Howard Kool Chevrolet v. Blomstedt*, 2 Neb. App. 493, 511 N.W.2d 222 (1994).

Evidence was insufficient to support finding that secured party resold automobile in violation of notice requirement of UCC § 9-504(3) where sale was actually conducted by repairman having garageman's possessory repair lien on vehicle in question, which was superior to secured party's perfected security interest under UCC § 9-310, and where evidence failed to show that repairman sold vehicle in concert with or as agent for secured party. *Magnavox Ft. Wayne Employees Credit Union v. Benson*, 165 Ind. App. 155, 331 N.E.2d 46 (1975).

Judgment in favor of secured creditor for reimbursement of fuel taxes paid to state board of equalization in order to obtain clear title to repossessed trucks before they were sold in satisfaction of debtor's defaulted obligation, was deficiency judgment, since taxes should have been paid out of proceeds of sale before satisfaction of debtor's underlying indebtedness. Accordingly, such judgment required reversal where creditor did not comply with requirements of UCC § 9-504(3), concerning notice of sale, in that notice to debtor did not explicitly set forth exact date, time, and place of sale, but only informed debtor that collateral would

be sold at end of seven days from date of letter to debtor and could be inspected at creditor's premises, where no public sale in terms of auction was in fact conducted, and where, even if creditor had complied with notice requirements, it failed to allege or prove such compliance in its complaint. *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474 (2d Dist. 1975).

Although Code does not require that secured party prove actual receipt of letter notifying debtor of sale, where secured party proved only that envelope had been sent, by introducing certified mail return receipt, and utterly failed to present any evidence as to contents of envelope, he failed to sustain his burden of proving compliance with requirements for notice of disposition. *Tauber v. Johnson*, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1st Dist. 1972), overruled on other grounds, *State Nat'l Bank v. Norwest Dodge, Inc.*, 108 Ill. App. 3d 376, 64 Ill. Dec. 26, 438 N.E.2d 1345 (1st Dist. 1982).

Conclusory statement that notice "went out in the normal course of business in my office as all mail does each day" is insufficient to prove "reasonable notice" under UCC § 9-504(3) without proof of customary office practice as to stamping, addressing, and posting. *Leasing Assocs. v. Slaughter & Son*, 450 F.2d 174 (8th Cir. Ark. 1971).

D. Application of Proceeds.

46. In general; creditor's expenses and attorney's fees.

Under Uniform Commercial Code Article 9, a security agreement may impose various charges that are not contained in the promissory note, with respect to which the security agreement was made, in the event of the debtor's default on the note. For example, under UCC § 9-504(1)(a) and § 9-506, the security agreement may provide for the debtor's payment, in the event of default, of the legal expenses and charges for repossession, storage, and redemption of the collateral. Furthermore, a valid acceleration clause in the security agreement can establish, in the event of default, a legal basis for collection from the debtor of both principal and accrued interest on the note. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. Ga. 1978).

A liquidated damage provision in a financing agreement providing that “reasonable attorneys’ fees” of 15% of the unpaid balance due are payable upon the acceleration of the entire indebtedness due to the assignor’s filing an assignment for the benefit of creditors, is subject to judicial review and modification under the court’s inherent right to supervise the charging of fees for legal services as part of the State’s strong public policy against the imposition of penalties in the private sector and its duty to protect “all creditors” from any possible mistake or possible overreaching. Courts will not enforce a liquidated damage provision which fixes damages in an amount “grossly disproportionate” to the harm actually or likely to be sustained by the nonbreaching party. The fixed percentage “attorneys’ fee” is only a “maximum fee” which the creditor may charge only upon first proving the extent of the necessary legal services “actually rendered”. *Coastline Steel Prods., Inc. v. Goldhaber*, 93 Misc. 2d 255 (1978).

Where security agreement provided that on debtor’s default, creditor could retain counsel to protect its interest and collect balance due, and that debtor would pay reasonable counsel fees in amount of 15% of such unpaid balance, court had power to order special hearing (1) to ascertain amount of fees received by creditor’s attorneys, and (2) to determine whether such amount was reasonable under UCC § 9-504(1)(a). *Coastline Steel Prods., Inc. v. Goldhaber*, 93 Misc. 2d 255 (1978).

UCC § 9-504(1)(a) relates to expenses, including attorney’s fees, of liquidating the collateral and does not authorize award of reasonable attorney’s fees for expenses incurred in bringing suit on a collateral promissory note. *Kohlenberg v. American Plumbing Supply Co.*, 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

Reference to attorneys’ fees in UCC §§ 9-504(1)(a) is only to permit recovery where state law recognizes recovery and was not intended to change Nebraska law that attorneys’ fees will be permitted only where state legislature has expressly provided by statute that award of such fees may be made by court; thus, the secured party was not entitled to retain attorneys’

fees from proceeds of sale of collateral as provided in security agreement. *Northwestern Nat’l Bank v. American Beef Packers, Inc.*, 548 F.2d 246 (8th Cir. Neb. 1977).

In action to recover on unpaid promissory notes secured by mortgage on realty, provision in both notes and mortgage that debtor agreed to pay reasonable attorney’s fees arising from default was unenforceable on public policy grounds under well-established rule of Kentucky case law; and such rule was not changed by Kentucky version of UCC § 3-106(1)(e), under which sum payable is “sum certain,” even though it is to be paid with costs of collection, or attorney’s fee not exceeding 15 percent of amount owing, or \$500, whichever is smaller, since such statute means only that attorney’s fee greater than that allowed by the statute would render instrument indefinite, and therefore nonnegotiable, for failure to contain sum certain. Nor was such provision in notes and mortgage rendered enforceable by UCC § 9-504(1)(a), dealing with secured party’s right to dispose of collateral and apply proceeds to, among other things, “reasonable attorney’s fees” incurred by secured party, since UCC § 9-504(1)(a) applies only to personalty that is used as collateral, and in present case collateral consisted of realty. *Mammoth Cave Prod. Credit Ass’n v. Geraldts*, 551 S.W.2d 5 (Ky. Ct. App. 1977).

Assignee of note and security agreement covering certain equipment did not have right to deduct from proceeds of sale of equipment following its repossession, expenses and attorney’s fees incurred in connection with its repossession and sale under UCC § 9-504 since plaintiff, as assignee, acquired no greater rights against debtor than assignor had against him at time of assignment; assignor had no claim for expenses connected with repossession and sale, or attorney’s fees for such purposes, since such expenses were all incurred by assignee, and, since assignor had not incurred any expenses of repossession, assignee acquired no rights for such expenses under the assignment. *Centennial State Bank v. S.E.K. Constr. Co.*, 518 S.W.2d 143 (Mo. Ct. App. 1974).

Attorney’s fees incurred in enforcing the security interest are properly allowed as

authorized by the Code and where also authorized by the particular security agreement. *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. Ark. 1967).

47. Secured debt.

In creditor's action to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that creditor had improperly conducted foreclosure sale of collateral would be sustained where creditor's own evidence showed that it had violated UCC § 9-504(1) and (2) by applying proceeds of sale to pay off senior liens on collateral before satisfying indebtedness secured by security interest under which disposition of collateral was made. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Where corporate debtor obtained numerous pieces of equipment from secured party in four distinct lots, each subject to distinct, but identical, security agreement, where two of these security agreements were guaranteed by individual guarantors, and where, upon default of all four agreements, secured party repossessed all four lots of equipment and sold them as single unit to single purchaser, secured party was not precluded by UCC from collecting deficiency merely because collateral was not sold in lots corresponding to separate lots in which collateral was first acquired by corporate debtor; even if creditor disposes of collateral in violation of UCC, debtor is not entitled to completely avoid its obligations to creditor, but is only entitled to recover "any loss" occasioned by secured party's failure to comply with appropriate provisions of UCC, and individual guarantors offered no evidence that any loss was suffered by corporate debtor because of form of disposition; furthermore, UCC does not require that repossessed collateral be disposed of in any particular manner and there was no evidence to show that sale of collateral in single lot was not disposition made in good faith and in commercially reasonable manner; however, secured party was not entitled to apply proceeds of sale, first to balances due on two security agreements which were not guaranteed, totally satisfying those obligations, and then to bal-

ances due on guaranteed security agreements leaving deficiency on them, but was required under UCC § 9-504(1)(b) to apply proceeds of disposition to satisfaction of indebtedness secured by security interest under which disposition was made. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

48. —Damages for loss of use.

Seller of tractor under purchase money security agreement was not entitled to recover damages from buyer for loss of use of tractor during period that tractor was wrongfully detained by buyer, where seller resold tractor for sum in excess of amount of underlying debt; UCC § 9-504(1) required that proceeds of sale be used to set aside debt, and recovery for loss of use of chattel during period of wrongful detention would effectively amount to double recovery. *Housatonic Tractor Corp. v. Kamins*, 50 A.D.2d 586 (2d Dep't 1975).

Where debtor sold vehicles that were subject to security interest to third party, secured party was entitled, on default, to enforce its right of possession against third party; failure of third party to surrender property immediately upon default and demand prevented secured party from using collateral under UCC § 9-207(4) or reselling or leasing it under UCC § 9-504(1), and third party was liable to secured party for loss of use of property as element of damages. *Long Island Trust Co. v. Porta Aluminum, Inc.*, 49 A.D.2d 579 (2d Dep't 1975).

49. —Interest.

Under Uniform Commercial Code Article 9, a security agreement may impose various charges that are not contained in the promissory note, with respect to which the security agreement was made, in the event of the debtor's default on the note. For example, under UCC § 9-504(1)(a) and § 9-506, the security agreement may provide for the debtor's payment, in the event of default, of the legal expenses and charges for repossession, storage, and redemption of the collateral. Furthermore, a valid acceleration clause in the security agreement can establish, in the event of default, a legal basis for collection from

the debtor of both principal and accrued interest on the note. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. Ga. 1978).

A lender whose security agreements provided for the debtor to pay a charge for what the lender contended was a "bonus" or capital payment but what was actually precomputed interest, may not collect that unearned interest from the proceeds of a public auction and sale which followed the debtor's default and acceleration of its indebtedness. *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 94 Misc. 2d 401 (1978).

Prior chattel mortgagee, after chattel mortgagor's default on loans and mortgagee's sale of collateral at public auction, was not entitled to deduct from sale proceeds amounts denominated "bonus" and "charges," so as to deprive subsequent chattel mortgagee of its rightful share, under UCC § 9-504(1)(c) and (2), of sale's proceeds because (1) such "bonus" and "charges" were actually "interest" on prior mortgagee's loan to debtor within meaning of UCC § 3-118(d), and (2) under New York law, lender was not entitled to collect unearned interest on money loaned in absence of subsequent agreement between lender and debtor. *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 94 Misc. 2d 401 (1978).

50. Subordinate interests.

Under UCC § 9-504(5), guarantor of debtor's note, as subrogee to rights of secured party, was successor to all of secured party's rights against debtor, including security interest in debtor's equipment. *Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904 (2d Cir. N.Y. 1978).

Creditor which had perfected security interest in most of debtor's assets on April 3, 1972, by filing proper financing statements, and which subsequently perfected such security interest in all of debtor's assets on January 28, 1975, by taking possession thereof, had under UCC § 9-301(1) and UCC § 9-312 right to assets superior to right of second creditor which did not acquire interest in assets until April 11, 1975, when it levied execution on judgment against debtor and became lien creditor under UCC § 9-301(3). Thus, on debtor's default, first creditor could sell

such assets under UCC § 9-504(1) and retain all proceeds of sale when proceeds did not fully satisfy debt owed to such creditor. *GE Co. v. Hol-Gar Mfg. Corp.*, 431 F. Supp. 881 (E.D. Pa. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. Pa. 1978).

In action in nature of interpleader to determine whether secured creditor or feedmen claiming agister's liens were entitled to proceeds from sale of debtor's collateral, where (1) secured creditor, which had perfected its security interest in all of debtor's collateral, peacefully took possession of collateral after debtor's default and sold it at public auction under UCC § 9-504(1), (2) feedmen's agister liens did not come into existence until after perfection of creditor's security interest, and (3) trial court's judgment in favor of feedmen was based on alleged agreement between secured creditor and feedmen that feedmen, if their claims were paid from the sale's proceeds, would not disrupt sale by announcing to those present that they had lien on property being sold, court would award sale proceeds to secured creditor which clearly had prior right thereto. In such case, even assuming that alleged contract between secured creditor and feedmen had been made, contract was unenforceable because forbearance to exercise nonexistent "right" to interfere with commercially reasonable sale could not constitute valid consideration for such contract. *Agristor Credit Corp. v. Unruh*, 571 P.2d 1220 (Okla. 1977).

Purchasers of assets of tavern business at foreclosure sale were not liable to prior secured party who had unperfected security interest in tavern business assets, notwithstanding prior secured party was not given notice of sale; fact that foreclosure purchasers had knowledge of prior interest in collateral was not by itself evidence of bad faith, as foreclosing party's security interest was superior to prior secured party's security interest, foreclosure purchasers paid substantial price (\$110,000) for assets, and there was no evidence that foreclosure purchasers knew that foreclosing parties failed to give notice required by UCC § 9-504. *Young v. Golden State Bank*, 39 Colo. App. 45, 560 P.2d 855 (1977).

In creditor's action to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that creditor had improperly conducted foreclosure sale of collateral would be sustained where creditor's own evidence showed that it had violated UCC § 9-504(1) and (2) by applying proceeds of sale to pay off senior liens on collateral before satisfying indebtedness secured by security interest under which disposition of collateral was made. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Where corporate debtor obtained numerous pieces of equipment from secured party in four distinct lots, each subject to distinct, but identical, security agreement, where two of these security agreements were guaranteed by individual guarantors, and where, upon default of all four agreements, secured party repossessed all four lots of equipment and sold them as single unit to single purchaser, secured party was not precluded by UCC from collecting deficiency merely because collateral was not sold in lots corresponding to separate lots in which collateral was first acquired by corporate debtor; even if creditor disposes of collateral in violation of UCC, debtor is not entitled to completely avoid its obligations to creditor, but is only entitled to recover "any loss" occasioned by secured party's failure to comply with appropriate provisions of UCC, and individual guarantors offered no evidence that any loss was suffered by corporate debtor because of form of disposition; furthermore, UCC does not require that repossessed collateral be disposed of in any particular manner and there was no evidence to show that sale of collateral in single lot was not disposition made in good faith and in commercially reasonable manner; however, secured party was not entitled to apply proceeds of sale, first to balances due on two security agreements which were not guaranteed, totally satisfying those obligations, and then to balances due on guaranteed security agreements leaving deficiency on them, but was required under UCC § 9-504(1)(b) to apply proceeds of disposition to satisfaction of indebtedness secured by security inter-

est under which disposition was made. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

51. Surplus.

Under UCC § 9-504(5), guarantor of debtor's note, as subrogee to rights of secured party, was successor to all of secured party's rights against debtor, including security interest in debtor's equipment. *Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904 (2d Cir. N.Y. 1978).

Under UCC § 9-501(3)(a), debtor's right to surplus under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), in the case of a transfer for security as opposed to a sale, cannot be waived by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Where (1) plaintiffs sought damages in class action against automobile credit company and automobile dealers for fraudulent and deceptive trade practices allegedly carried on by defendants as part of illegal combination and conspiracy in restraint of trade, in violation of Federal Trade Commission Act and Sherman Anti-Trust Act, and (2) plaintiffs' complaint had as its sole thrust the claim that plaintiffs had been misled into not claiming surplus due them under UCC § 9-504(2) following repossession and resale, after default, of cars purchased by plaintiffs, court held that although plaintiffs might be asserting a wrong and might have a common-law remedy by way of a tort or contract action, defendants' alleged conduct clearly was not intended to restrict competition and did not have effect of restricting it. *Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132 (D.C.S.C. 1976), *aff'd*, 573 F.2d 1306 (4th Cir. S.C. 1978).

Under UCC § 9-202, legal title to equipment of corporation, if not immaterial, was not decisive as to extent to which equipment could be carried as asset on corporation's balance sheet, even when transaction was cast in terms of lease-purchase option agreement, and in light of UCC § 9-504(2), such equipment represented net asset to extent that its value exceeded any indebtedness secured by it.

Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979).

Where there was no claim that collateral had not been sold in “commercially reasonable” manner as required by UCC § 9-504(3) and where collateral was sold for less than unpaid balance due on note, secured party was not required to account to debtor for surplus resulting from sale of collateral as provided by UCC § 9-504(2). *Panagiotis v. Plummer*, 5 Mass. App. Ct. 821, 362 N.E.2d 555 (1977).

Where stock that was security for loan was surrendered by escrow agent to secured party following debtor’s default, at which time its market value was less than amount due on loan, and where secured party sought to recover deficiency, but retained stock and had it registered in secured party’s name, actions of secured party did not constitute “otherwise disposing of collateral” within meaning of UCC § 9-504(1) and debtor was entitled to relief under UCC § 9-507 when stock subsequently appreciated in value to amount in excess of secured loan. *In re Copeland*, 531 F.2d 1195 (3d Cir. Del. 1976).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

Under UCC § 9-504 secured creditor must account for any surplus realized from use or sale of collateral in excess of debt secured and under UCC § 9-112 surplus belongs to owner of collateral; thus, in action to obtain accounting from secured party for money or benefit it received from use and sale of equipment it repossessed and for judgment for any amount exceeding note secured by lien agreement on equipment, pleadings sufficiently alleged plaintiff’s entitlement to any surplus which might exist where pleading, *inter alia*, alleged that equipment belonged to plaintiff. *C & L Serv. Co. v. Northern Equip. Co.*, 525 P.2d 1260 (Okla. Ct. App. 1974).

Where secured party repossessed mobile home, which had been purchased by 2

debtors, sold repossession title to one debtor who in turn sold mobile home to third party and third party borrowed money from secured party to make purchase, and where net result of transaction was that secured party canceled balance due on original installment sales contract, \$698.75, paid debtor \$1,502.36, and became creditor of third party for sum of \$2,201.11, transaction amounted to sale of repossessed mobile home to third party for \$2,201.11 leaving surplus of \$1,502.36 and other debtor, who was not given notice of sale, was entitled to one half of surplus. *Morris v. Number 5 Creditthrift of Am., Inc.*, 20 Ill. App. 3d 280, 314 N.E.2d 616 (5th Dist. 1974).

In action by plaintiff-debtor to recover surplus from foreclosure sale of used truck, where truck had been purchased by plaintiff for \$23,500, plaintiff defaulted, and approximately six months after sale to plaintiff truck was resold for \$21,494.40 in cash, plus trade-in allowance of \$7,561.60 on vehicle which was later sold for \$1,400, or total price of \$29,056, surplus in favor of plaintiff should be computed by using actual market value of trade-in vehicle, \$1,400, and not on basis of trade-in allowance. *Webster v. GMAC*, 267 Or. 304, 516 P.2d 1275 (1973) but see *Carlson v. Blumenstein*, 293 Or. 494, 651 P.2d 710 (1982).

Where secured party and cosigner of note failed after repossession of collateral to proceed in accordance with UCC provisions for disposition of collateral upon default, debtor was entitled to recover as damages value of security less debt. *Farmers State Bank v. Otten*, 87 S.D. 161, 204 N.W.2d 178 (1973).

E. Deficiencies.

52. In general; scope.

Where secured party obtained default judgment on debtor’s promissory notes covering loans on two vehicles and then, after failure of its attempted levy on vehicles, sought to replevy them pursuant to provisions of its security agreement, with debtor, court held (1) that under UCC §§ 9-501(1) and (5) and Official Comment 6, secured party was not precluded from replevying vehicles under the security agreement by first having obtained de-

fault judgment on the debt; (2) that plaintiff's security interest in vehicles did not merge into such judgment because plaintiff had two separate causes of action, namely, to reduce debt to judgment and to foreclose under its security agreement; (3) that UCC §§ 9-501(1) and (5) were intended to abolish doctrine of election of remedies; (4) that New Mexico UCC § 9-504(2) (not part of Official UCC), which provides that debtor is liable for any deficiency except where collateral is consumer goods, did not prevent plaintiff from replevying vehicles in suit, which were consumer goods, since New Mexico UCC § 9-504(2), by its own terms, contemplated a "deficiency"; (5) that there could be no deficiency in present case until there had been a repossession and sale of consumer goods constituting debtor's collateral; and (6) that until such sale and an attempt to collect any resulting deficiency, debtor had not been injured. *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978).

Secured creditor who has liquidated his security may maintain action for deficiency judgment, but such secured creditor has burden to prove that due notice of sale as provided by law was given to debtor and that sale was commercially reasonable. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Where defendant buyer purchased airplane secured by contemporaneously executed security agreement from plaintiff's assignor with intent that it be used for personal rather than commercial purposes, and aircraft was, in fact, used solely for personal purposes for three months after purchase, airplane constituted "consumer goods" within meaning of Washington version of UCC § 9-501(1), which makes defaulting debtor not liable for any deficiency after secured party has disposed of collateral in cases involving purchase money security interests in consumer goods taken or retained by sellers of such collateral, notwithstanding defendant did make plane available for rental about nine months after executing security agreement and notwithstanding airplane was expensive hobby item. *Commercial Credit Equip. Corp. v. Carter*, 83 Wash. 2d 136, 516 P.2d 767, 77 A.L.R.3d 1218 (1973).

Common-law doctrine of election of remedies was abrogated by UCC § 9-504(2) which entitled secured creditor, after repossession and sale of motor vehicle upon default in payment of sum due under retail instalment contract, to deficiency judgment against defaulting purchaser. *Swindel v. General Fin. Corp.*, 265 So. 2d 393 (Fla. App. 1972).

A security holder who has repossessed a truck under a defaulted conditional sales contract is required to liquidate it at reasonable public sale as a condition of seeking further recovery from the conditional purchaser; and the conditional purchaser's obligation is limited to whatever deficiency remains after such a sale. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

53. Agreements of parties.

Action by assignee of installment contract against assignor for deficiency judgment after assignee had repossessed and sold collateral; held, assignee's only recourse was against purchaser where no formal demand for repurchase was made by assignee as provided in dealer agreement between parties. *Foundation Discts., Inc. v. Serna*, 81 N.M. 474, 468 P.2d 875 (1970), overruled on other grounds, 87 N.M. 451, 535 P.2d 1077 (1975).

When the debtor returns the collateral to the secured seller and the latter accepts it, there is an accord and satisfaction that terminates the liability of the debtor for any loss on resale of the collateral. *Johnson v. Commercial Credit Corp.*, 117 Ga. App. 131, 159 S.E.2d 290 (1968).

Where an assignee of a conditional sales contract which repossessed an automobile on conditional buyer's default in making of payments sold the automobile four days after repossession in violation of Mass GL c. 255, § 11, there was a breach of contract by such assignee, precluding the maintenance of an action for deficiency predicated upon the resale. *Associates Disct. Corp. v. Girard*, 19 Mass. App. Dec. 95 (1960).

54. Commercial reasonableness.

The failure to give a debtor notice of sale when required under subd (3) of this section does not completely discharge his

obligation to pay any resulting deficiency, but he has the right to recover from the secured party any loss occasioned by the failure to give notice. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Defendants, as personal guarantors of a corporate loan used to purchase machinery, may, in an action by plaintiff bank to recover a deficiency judgment against them following repossession and sale of the mortgaged equipment, properly set up the defense available to the debtor corporation as the principal obligor, that plaintiff failed to prove "reasonable notification" of the sale to the debtor corporation and that the "method, manner, time and terms" of the disposition of the repossessed equipment were "commercially reasonable" (Uniform Commercial Code, § 9-504) since, as a general rule a surety, defending an action against his principal, may set up any legal or equitable defense which would have availed the principal and is not bound by the default of the principal and may contest its liability to the indemnitee. *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), aff'd, 70 A.D.2d 786 (4 Dep't 1979).

UCC § 9-504(3) requires, as condition to right of secured party to obtain deficiency judgment, that disposition of collateral be effected with reasonable notification to debtor and that it also be commercially reasonable. *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), aff'd, 70 A.D.2d 786 (4 Dep't 1979).

Disposition of collateral, which consisted of an electronic two-way communications system, was not commercially reasonable under UCC § 9-504(3) where (1) secured party was successful bidder at public auction of the collateral, (2) only one other bid was made, (3) bidders in attendance at sale with any real interest in the collateral were few in number, (4) few efforts were made to encourage meaningful bidding, and (5) substantial disparity existed between price recovered on the disposition (\$32,775) and deficiency for which judgment was sought (slightly over \$325,000). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

Repossession and disposition procedures used by secured party did not comply with those provided in Article 9 of UCC where, after repossessing automobiles, notice of sale was sent by registered mail to each defaulting purchaser advising him that his car would be sold at public auction to highest bidder on specified date for not less than specified minimum amount, where only public notice of sale was blackboard placed in office of secured party listing date of sale, initials of defaulting purchaser, and year and make of automobile, where secured party did not conduct sale at public auction, as stated in notice of sale, but on date of sale credited debtor's account with minimum price stated in notice of sale and then proceeded to collect deficiency by taking judgment on cognovit notes signed by debtors, and where secured party then obtained repossession titles for automobiles involved and resold them from its used car lot, at retail, to other consumers at substantially higher prices than amounts credited. Although UCC § 9-505(2) authorizes secured party in possession of repossessed goods to retain those goods in satisfaction of debtor's obligations, provided written notice of such intention is sent to debtor and debtor does not object within 30 days, and although debtors in present case made no objection to proceedings, secured party did not comply with provisions of UCC § 9-504 and, thus, was not entitled to deficiency judgment as permitted under UCC § 9-504(2). *Miles v. N.J. Motors, Inc.*, 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975).

Compliance with Code § 9-504(3) is condition precedent to recovery of any deficiency between sale price of collateral and amount of unpaid balance; and where plaintiffs had not been informed as to whether defendants contemplated private or public sale of diamond bracelet pledged as security on note and plaintiff had not waived demand to redeem and notice of time and place of sale, defendants were not entitled to recover alleged deficiency or attorney fees. *Aimonetto v. Keepes*, 501 P.2d 1017 (Wyo. 1972).

55. —Notice defects; deficiency judgment denied.

Where (1) seller sold computer system under purchase agreement which pro-

vided that seller would retain security interest in goods until balance of purchase price was paid, (2) buyer, after taking possession of goods on January 14, 1975, advised seller on January 30, 1975 to repossess them for seller's protection because buyer was in financial difficulty, and (3) seller, after repossessing goods on February 3, 1975, subsequently returned part of them to seller's new-equipment inventory without separately identifying such goods from goods already in inventory and also, without notifying buyer, resold some of the repossessed goods to third persons, court held (1) that seller was limited to remedy of security-interest holder under UCC § 9-504, which governed seller's right to repossess the goods in suit, dispose of them, and apply their proceeds, and (2) that because seller, on reselling some of the goods after their repossession, had failed to give buyer notice of sale required by UCC § 9-504(3), seller under California construction of UCC § 9-504(3) could not recover deficiency on unpaid purchase price from buyer. *Nixdorf Computer, Inc. v. Jet Forwarding, Inc.*, 579 F.2d 1175 (9th Cir. Cal. 1978).

Where assignee (secured party) of equipment lease of drilling machine, on default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to deficiency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for defi-

ciency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), *cert. dismissed*, 362 So. 2d 1056 (Fla. 1978).

UCC § 9-504(3) requires, as condition to right of secured party to obtain deficiency judgment, that disposition of collateral be effected with reasonable notification to debtor and that it also be commercially reasonable. *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), *aff'd*, 70 A.D.2d 786 (4 Dep't 1979).

Failure of secured party to give debtor notice of sale of the collateral, as required by UCC § 9-504(3), absolutely bars any deficiency judgment. *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Where bank upon default of note and commercial equipment security agreement sold collateral without giving notice to guarantors, under UCC § 9-504(3) failure of secured party to give requisite notice prior to sale or disposition of collateral precluded action for deficiency against guarantor. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Where no notice of time, date, place and manner of sale was ever given to debtor by secured party as is normally required under UCC § 9-504(1) and (3), secured party was not entitled to deficiency judgment or

attorney's fees and debtor was entitled to damages pursuant to UCC § 9-507. *Chrysler Credit Corp. v. Burns*, 562 P.2d 233 (Utah 1977).

Seller's assignee, in suit for deficiency judgment following sale of repossessed collateral, was properly denied recovery where evidence showed (1) that assignee did not sell collateral in commercially reasonable manner required by UCC § 9-504(3), (2) that debtor was not notified of sale, and (3) that assignee's sole witness did not know how sale had been conducted, or whether numerous bids had been solicited in order to get best price obtainable for collateral, or what market value of collateral was at time of sale. In such case, which was tried without a jury, since trial court was deprived of knowledge of amount that assignee should have realized from commercially reasonable sale and no evidence was introduced as to collateral's market value, trial court under UCC § 2-723(2) could look to market value of collateral on date of its purchase by debtor and reasonably view such value as continuing until sale of collateral, with result that no deficiency was owed by debtor to assignee. *Aetna Fin. Co. v. Ables*, 559 S.W.2d 139 (Tex. Civ. App. 1977).

Where owner of automobile, which was repossessed after default on installment contract, did not receive notice of place of public sale and where, although automobile was in good condition, proceeds obtained less than six months after initial purchase were only about 55% of the amount originally financed, creditor could not recover deficiency judgment in absence of showing that the method, manner, time, place and terms of sale were in fact commercially reasonable. *Marine Midland Bank-Central v. Watkins*, 89 Misc. 2d 949 (1977).

Although bank was permitted to dispose of repossessed automobile without judicial process or notice to co-signer of installment sales contract, bank was not entitled under UCC § 9-504(3) to deficiency judgment against co-signer, where bank failed to give notice to co-signer of intended sale of repossessed automobile. *Washington v. First Nat'l Bank*, 332 So. 2d 644 (Fla. App. 1976).

In action to recover deficiency judgment from debtor and guarantor after sale of

property taken by bank under security instruments, where bank disposed of property in several transactions and in some of transactions failed to give notice of sale as required by UCC § 9-504(3) and in others failed to prove reasonableness of notice, i.e., notice should be sent in such time that debtors would have minimum of three business days to arrange to protect interests, failure to give notice barred recovery of deficiency judgment. *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). But see *Howard Kool Chevrolet v. Blomstedt*, 2 Neb. App. 493, 511 N.W.2d 222 (1994).

Guarantors of promissory note secured by collateral were "debtors" within meaning of UCC §§ 9-105(1)(d) and 9-504(3) and were entitled to reasonable notification prior to disposition of collateral by secured party; failure to provide such notice precluded entry of deficiency judgment in action by secured party against guarantors. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. App. 1975).

Secured party was not entitled to recover alleged deficiency due after sale of repossessed automobile since (1) three days' notice of resale was not commercially reasonable under UCC § 9-504(3); (2) sale of automobile for only \$50 was not in good faith, under UCC § 1-203, or in commercially reasonable manner under UCC § 9-504(3), although automobile was inoperable, where casual inspection would have revealed that automobile was missing spark plugs, points and air cleaner, and installation of these items would have made car operative and would only have required small expenditure; and (3) presumption that collateral was worth at least amount of debt, which arose as result of secured creditor's failure to give sufficient notice of resale, was not overcome by creditor's evidence. *Franklin State Bank v. Parker*, 136 N.J. Super. 476, 346 A.2d 632 (1975).

Secured party was not entitled to recover deficiency judgment on promissory notes secured by mobile home and automobile where secured party took possession of mobile home and automobile and sold them without notice to debtor as required by UCC § 9-504(3). *FDIC v. Farrar*, 231 N.W.2d 602 (Iowa 1975).

Judgment in favor of secured creditor for reimbursement of fuel taxes paid to state board of equalization in order to obtain clear title to repossessed trucks before they were sold in satisfaction of debtor's defaulted obligation, was deficiency judgment, since taxes should have been paid out of proceeds of sale before satisfaction of debtor's underlying indebtedness. Accordingly, such judgment required reversal where creditor did not comply with requirements of UCC § 9-504(3), concerning notice of sale, in that notice to debtor did not explicitly set forth exact date, time, and place of sale, but only informed debtor that collateral would be sold at end of seven days from date of letter to debtor and could be inspected at creditor's premises, where no public sale in terms of auction was in fact conducted, and where, even if creditor had complied with notice requirements, it failed to allege or prove such compliance in its complaint. *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474 (2d Dist. 1975).

Where secured party failed to give required notice of sale of collateral and failed to conduct sale in commercially reasonable manner, this failure barred deficiency judgment where the failure was raised as affirmative defense. *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 59 A.L.R.3d 389 (3d Dist. 1972).

A secured creditor may not recover a deficiency judgment under the UCC after a sale of a repossessed article that was not conducted in accordance with the notice provisions of UCC § 9-504(3). *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089 (1971).

Auto dealer sold car to defendant-buyer for net sum of \$1700; dealer assigned sales contract to plaintiff-assignee; plaintiff-assignee repossessed auto and sold it back to dealer for \$348; dealer resold auto for \$1050; held, \$348 transaction was mere transfer, not sale or disposition, of collateral; therefore, notice of this transaction to defendant-buyer could not comply with requirement of "reasonable notification of time and place" of sale of repossessed collateral, and plaintiff-assignee could not recover balance due on contract, where defendant-buyer had not been notified of resale of auto for \$1050.

Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138 (1969).

New York courts would not permit the holder of a conditional automobile sales contract to secure a deficiency judgment, where the car had been repossessed and sold in Massachusetts without notice to the debtor in violation of the Massachusetts Uniform Commercial Code, although such a sale was permissible under the laws of the District of Columbia where the contract was originally made. *Associates Disct. Corp. v. Cary*, 47 Misc. 2d 369 (1965).

56. —Notice defects; deficiency judgment granted.

Section 9-504 of the Uniform Commercial Code, which provides that after the debtor defaults on a debt a secured party may sell, lease or otherwise dispose of any collateral in the manner provided in the statute and the debtor shall be liable for the deficiency, is applicable to determine the rights of the parties where plaintiff, a secured party which took possession of collateral upon the default of defendant debtors, received a letter from defendants, as maker and guarantors of the note, consenting to plaintiff's proposal to retake the collateral and, as to the inventory, consenting to plaintiff's suggested method of disposition, inasmuch as not only was it within their power to set the standards by which their rights and duties were to be measured (Uniform Commercial Code, § 9-501, subd [3]), but having accepted the terms in plaintiff's letter, defendants may not challenge the method of disposition or value placed on the inventory. Plaintiff failed to comply with the provisions of section 9-504 regarding fixtures where a letter from plaintiff contained no proposal for their disposition and defendants' consent extended no further than agreeing to possession, since section 9-504 requires that after taking, the collateral shall be disposed of in a commercially reasonable manner after notice to the debtor; however, this failure to comply does not deprive plaintiff of its deficiency judgment, but it must prove, at trial, the amount of the debt, the fair market value of the security and the resulting deficiency. *S.M. Flickinger Co. v. 18 Genesee Corp.*, 71 A.D.2d 382 (4th Dep't 1979).

Plaintiff bank, which upon defendant securities dealer's default was entitled, according to the terms of a security agreement, to liquidate municipal bonds held as collateral for loans made to defendant, disposed of the bonds in a commercially reasonable manner in light of the standard prevailing in the municipal securities market (Uniform Commercial Code, § 9-504, subd [3]) where the proceeds received from the sale were the actual market value on the date of the sale and the bonds were sold through regular market channels; a secured party has a right to protect its legitimate self-interest and need not fall back upon his debtor's recommendations in order to satisfy his duty of reasonable care; accordingly, plaintiff's motion for summary judgment to recover a deficiency from the sale should be granted as a matter of law. *Bankers Trust Co. v. J.V. Dowler & Co.*, 47 N.Y.2d 128, 390 N.E.2d 766 (1979).

UCC § 9-504(3) requires, as condition to right of secured party to obtain deficiency judgment, that disposition of collateral be effected with reasonable notification to debtor and that it also be commercially reasonable. *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967 (1978), *aff'd*, 70 A.D.2d 786 (4 Dep't 1979).

Where secured creditor who has liquidated his security fails to sustain his burden of proving that due notice of sale of collateral as provided by law was given to debtor and that sale of collateral was commercially reasonable, debtor may still recover deficiency judgment by proving amount of debt, fair value of security, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Where equipment lessees were given ample time to arrange for sale of equipment following their default under lease agreement, sale of equipment by lessors was conducted in commercially reasonable manner, and lessees failed to timely raise issue as to lack of statutory notice of sale pursuant to UCC § 9-504(3), lessor was entitled to recover balance due under lease. *Maguire Leasing Corp. v. Irving Falb & Co.*, 49 A.D.2d 540 (1st Dep't 1975).

Action by lessor of computer for deficiency following lessee's default on written

lease agreement was not precluded by fact that lessor failed to give lessee notice of resale following repossession as required by UCC § 9-504(3); lessor was entitled to recover entire balance due under lease, where lessee offered no proof of loss resulting from lessor's failure to give notice as provided in UCC § 9-507. *Leasco Computer, Inc. v. Sheridan Indus., Inc.*, 82 Misc. 2d 897 (1975).

Although notice of private sale was insufficient under UCC § 9-504(3) in that it did not specify time after which sale was to be made, secured party was entitled to deficiency judgment against defaulting purchaser of snowmobiles where competitive bid method utilized by secured party was commercially reasonable under UCC § 9-504(1) and (3), defendant-purchaser had voluntarily relinquished possession of collateral because he had been unable to sell snowmobiles, purpose of relinquishment was to allow plaintiff to sell them, and defendant had notice of secured party's intention to sell snowmobiles, made no response, and was financially unable to take any action. *Commercial Credit Corp. v. Wollgast*, 11 Wash. App. 117, 521 P.2d 1191 (1974), review denied, 84 Wash. 2d 1004 (1974).

Seller is entitled to deficiency judgment from debtor under UCC § 9-504 where one of several items of equipment in the possession of the secured party has been sold without reasonable notice of the sale having been first given to the debtor. *Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (1972), review denied, 81 Wash. 2d 1001 (1972).

57. —Price.

A defendant guarantor, conceding the validity of a guarantee agreement and the default in installment payments by the purchaser, is entitled to a trial on the issue of whether the foreclosure sale by the plaintiff secured party was performed in a commercially reasonable manner pursuant to section 9-504 of the Uniform Commercial Code since there was a marked discrepancy between the sale item's appraised value and the sale price thus increasing the amount of the deficiency judgment claimed by the secured party and that language in the guarantee agreement stating that the guarantor

“waives exercise of possessory, foreclosure or other remedies by you [secured party] against Customer” does not constitute a waiver of guarantor’s right to claim that the foreclosure sale was not conducted in a commercially reasonable manner. *GECC v. Durante Bros. & Sons*, 96 Misc.2d 561 (1978).

Secured party was not entitled to recover alleged deficiency due after sale of repossessed automobile since (1) three days’ notice of resale was not commercially reasonable under UCC § 9-504(3); (2) sale of automobile for only \$50 was not in good faith, under UCC § 1-203, or in commercially reasonable manner under UCC § 9-504(3), although automobile was inoperable, where casual inspection would have revealed that automobile was missing spark plugs, points and air cleaner, and installation of these items would have made car operative and would only have required small expenditure; and (3) presumption that collateral was worth at least amount of debt, which arose as result of secured creditor’s failure to give sufficient notice of resale, was not overcome by creditor’s evidence. *Franklin State Bank v. Parker*, 136 N.J. Super. 476, 346 A.2d 632 (1975).

Where a finance company failed to give the automobile dealer notice where it sold automobiles removed from the dealer’s place of business, the finance company could not recover from the dealer for losses sustained on sales of automobiles and the expenses of such sales. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

58. Evidence and burden of proof.

Secured party who (1) pursuant to UCC § 9-504(1) sold collateral (truck tractor) at private sale for \$1,000, although debtor had borrowed \$25,000 from secured party to buy collateral, (2) did not give debtor notice of sale required by UCC § 9-504(3), and (3) allegedly violated UCC § 9-504(3) by conducting sale in commercially unreasonable manner could maintain action against debtor and guarantor of debtor’s note for deficiency judgment on debtor’s obligation. However, in such case, secured party had burden of proving that due notice of sale had been given to debtor and

that sale had been conducted in commercially reasonable manner. Furthermore, even if secured party should fail to present such proof at the trial, he could still recover deficiency judgment by proving amount of debt, fair value of collateral, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep’t 1977).

Where secured creditor who has liquidated his security fails to sustain his burden of proving that due notice of sale of collateral as provided by law was given to debtor and that sale of collateral was commercially reasonable, debtor may still recover deficiency judgment by proving amount of debt, fair value of security, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep’t 1977).

Notwithstanding secured party’s failure to notify debtor, as required by UCC § 9-504(3), of sale of collateral after debtor’s default, secured party still has right to bring action for deficiency judgment, since debtor under UCC § 9-507(1) has right of action against secured party for latter’s failure to proceed properly with sale of collateral. However, if secured party sells collateral without giving debtor notice required by UCC § 9-504(3), he must then prove, in his action for deficiency judgment, that reasonable value of collateral at time of sale was less than amount of debt owed by debtor. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Creditor’s default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor’s failure to dispose of collateral as required by Code raised pre-

sumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Although secured party failed to give notice of sale of repossessed automobile, secured party would be entitled to recover deficiency judgment, but would have burden of proving market value of collateral by evidence other than amount received at repossession sale. *Community Mgt. Ass'n v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973).

As a prerequisite to the recovery of a deficiency judgment, the secured party has the burden, under UCC § 9-504(3), of proving either the actual value of the collateral at the time of its sale after repossession or proving that reasonable notice was sent (receipt need not be proven). *Leasing Assocs. v. Slaughter & Son*, 450 F.2d 174 (8th Cir. Ark. 1971).

In the absence of evidence that following the repossession of a truck under a defaulted sales contract the collateral was sold and that a deficiency resulted, the security holder has no claim against the conditional purchaser. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

F. Purchases for Value.

59. In general.

Sellers of tavern business who had valid, but unperfected, security interest in assets of business presented prima facie case of loss caused by lack of notice under UCC § 9-507(1) where banks that had subsequent, but perfected, security interests in assets of tavern business foreclosed and sold assets to third party, where there was undisputed testimony that banks and third party were aware of sellers' security interest and banks in fact agreed to indemnify third party against claims arising from original security agreement, where banks failed to give notice as required by UCC § 9-504, and where debt owing to banks at time of foreclosure was approximately \$45,000, but foreclosure sale grossed \$110,000, and difference was unaccounted for. *Young v. Golden State*

Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

Where automobile dealer financed his used car inventory through floor plan arrangement with finance company and, under side arrangement with second automobile dealer, satisfied his obligations to finance company by assigning used cars to second dealer, who would then issue its note to finance company in release of first dealer's note, but such cars were frequently left on first dealer's lot and sold by him on commission basis, and where first automobile dealer then entered into agreement with credit corporation to finance his new car inventory and executed security agreement in favor of credit corporation covering his inventory, including, inter alia, his used car inventory: (1) Credit corporation acquired perfected security interest in first dealer's used car inventory; (2) security interest was not waived by clause in security agreement providing that private sale of chattel to dealer in such types of chattels for amount originally paid by dealer for such chattel or at lesser fair price would be "commercially reasonable disposition thereof," nor was it waived by fact that credit corporation treated dealer's used car business as completely separate from his new car business which credit corporation was financing; (3) sales of used cars to second dealer, made at arm's length, without fraud and at fair price, were sales in ordinary course of business, and, hence, second dealer acquired title to such cars free of security interest. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

The failure of the secured party to give the notice required by UCC § 9-504(3) does not impair the title of the good faith purchaser at the sale. *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 155 S.E.2d 651 (1967).

A conditional seller of personal property cannot maintain an action for conversion against a third person unless the seller had possession or the right to possession when the chattel was taken from him. *Ludlow Rubber Co. v. Mack Truck Sales, Inc.*, 38 Mass. App. Dec. 78 (1967).

G. Transfers of Collateral.

60. In general.

In action by retail furniture dealer which had entered into agreement with defendant financier, under which plaintiff transferred its accounts receivable to defendant in exchange for, being provided with funds in specified proportion to accounts defendant accepted from plaintiff, to recover sums held in reserve account established by parties' agreement, (1) plaintiff's accounts receivable were not sold to defendant, but were transferred to it as collateral security within meaning of UCC § 9-502(2) in exchange for line of credit defendant extended to plaintiff; (2) as a result, under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), defendant was required to account for, and to turn over to plaintiff, any surplus collected by defendant on the transferred accounts, and plaintiff in turn was liable for any deficiency on such accounts; and (3) surplus held by defendant on loan owed by plaintiff and deficiency on such loan were cross-obligations that must be set off against each other. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of

note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

In action by plaintiff against two former business associates seeking damages for alleged conspiracy to appropriate stock which plaintiff had pledged to bank as security for loan, where, after plaintiff defaulted, bank sold stock to defendants pursuant to repurchase agreement executed in connection with loan transaction: (1) after default, plaintiff still had legal title to stock, subject to bank's lien which could have been extinguished by public sale as provided in UCC; (2) to recover stock from bank, plaintiff was required to make valid tender of amount of debt, plus accrued interest, as condition precedent to right to maintain suit; (3) under UCC § 9-504(5), when bank conveyed stock to defendants in accord with their repurchase agreement, defendants became subrogated to rights and duties of bank and, hence, plaintiff's action against defendants was barred by his failure to make such tender or to show any excuse or justification therefor. *Barnett v. Maida*, 503 S.W.2d 610 (Tex. Civ. App. 1973), *writ ref'd n.r.e.*, (May 22, 1974).

Auto dealer sold car to defendant-buyer for net sum of \$1700; dealer assigned sales contract to plaintiff-assignee; plaintiff-assignee repossessed auto and sold it back to dealer for \$348; dealer resold auto for \$1050; held, \$348 transaction was mere transfer, not sale or disposition, of collateral; therefore, notice of this transaction to defendant-buyer could not comply with requirement of "reasonable notification of time and place" of sale of repossessed collateral, and plaintiff-assignee could not recover balance due on

contract, where defendant-buyer had not been notified of resale of auto for \$1050. *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138 (1969).

H. Practice and Procedure.

61. In general.

In action brought by secured creditor against maker and guarantor of note to recover deficiency alleged to be due on note after secured creditor sold collateral, summary judgment in favor of secured creditor was precluded by existence of factual issues concerning propriety of notice of sale and whether sale was conducted in commercially reasonable manner. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

In action for deficiency judgment following repossession and sale of mobile home, wherein defense was lack of notice as to sale and commercial unreasonableness of sale and defendant counterclaimed for assessment of penalty against plaintiff for noncompliance with Uniform Commercial Code, court erred in striking defendant's interrogatories seeking information concerning sale and inquiring into existence of any relationship that might give reason to question propriety of sale and its commercial reasonableness, but court did not abuse its discretion in striking interrogatories seeking information either irrelevant or previously requested in other interrogatories. *Lincoln First Bank v. Rhoades*, 59 A.D.2d 1046 (4th Dep't 1977).

In action by new car buyers against automobile dealer and bank for wrongful resale of repossessed motor vehicles, questions relating to bank's failure to give proper notice of disposition of repossessed automobiles and its failure to account to plaintiffs for any surplus were not common questions of fact and law and affecting rights of alleged class and, thus, were not suitable questions for determination in class action. *Ridley v. First Nat'l Bank*, 87 N.M. 184, 531 P.2d 607 (Ct. App. 1974), cert. denied, 87 N.M. 179, 531 P.2d 602 (1975).

Lower court judge was not justified in concluding that petitioner made the requisite showing of probable success to warrant issuing preliminary injunction in an action to prevent foreclosure on collateral

pursuant to statute. *Dopp v. Franklin Nat'l Bank*, 461 F.2d 873 (2d Cir. N.Y. 1972), on remand, 374 F. Supp. 904 (S.D.N.Y. 1974).

62. Limitation of actions.

Causes of action asserted in an action brought in 1977 based upon the alleged use of confidential information in bad faith in connection with the purchase of pledged collateral at a private sale conducted in 1973, absent an indication of a contractual or fiduciary relationship between the parties, are based either in tort or statutory liability under section 9-504 (subd [4], par [b]) of the Uniform Commercial Code and in either event fall within the three-year Statute of Limitations imposed by CPLR 214 and are therefore time-barred. *Sumner v. Century Nat'l Bank & Trust Co.*, 92 Misc. 2d 726 (1978).

A cause of action based upon the claim that a sale of pledged collateral was made under circumstances which were not commercially reasonable in violation of subdivision (3) of section 9-504 of the Uniform Commercial Code is not an action to recover on a liability imposed by statute within the meaning of CPLR 214 (subd 2) requiring that such actions be commenced within three years, since the duty to conduct a commercially reasonable sale of pledged property exists apart from statute under the general maxims of equity and in order for the three-year limitation to attach the liability must be one which would not exist but for statute. *Sumner v. Century Nat'l Bank & Trust Co.*, 92 Misc. 2d 726 (1978).

Action under Code § 9-504(2) to recover surplus from resale of repossessed article was more closely related to security aspects of contract than it was to that part which concerned original sale, so that action was governed, not by 4 year statute of limitations in Code Sales Article, but by general contract statute of limitations of 6 years. *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239, 59 A.L.R.3d 1199 (1972).

63. Pleadings.

Allegations by pledgor of stock that officers and directors of corporation conspired with pledgee bank to shift balance of voting power by selling pledged shares

in violation of bank's oral agreement and by concealing identity of purchaser, although possibly sufficient to state cause of action in tort for interference with business relations and in violation of UCC § 9-504, were not sufficient to constitute cause of action for fraud under federal securities laws. *Dopp v. Franklin Nat'l Bank*, 461 F.2d 873 (2d Cir. N.Y. 1972), on remand, 374 F. Supp. 904 (S.D.N.Y. 1974).

64. —Defenses.

If "lease" between parties actually created security interest, debtor was entitled under UCC § 9-501(3)(b) and § 9-504(3) to assert, in action for deficiency judgment following sale of collateral, defense of lack of notice of such sale. *Burns v. Equilease Corp.*, 357 So. 2d 786 (Fla. App. 1978).

Where secured party failed to give required notice of sale of collateral and failed to conduct sale in commercially reasonable manner, this failure barred deficiency judgment where the failure was raised as affirmative defense. *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 59 A.L.R.3d 389 (3d Dist. 1972).

65. Jury issues.

Instruction to jury "that for a sale to be commercially reasonable, the property to be foreclosed must be sold in a manner that similar property is sold in the ordinary course of business in the community, by persons who are in the ordinary business of selling such property," denied secured party the flexibility afforded it under the Uniform Commercial Code (see UCC § 9-504(3)), since it left jury with impression that, as a condition precedent to any sale of an automobile collateral in present case) being "commercially reasonable," it must be sold in same manner that similar property is sold in the ordinary course of business. *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

Under UCC § 9-504(3), whether creditor's disposition of defaulting debtor's collateral was commercially reasonable is ordinarily question of fact. If creditor decides to liquidate collateral, he must act as debtor's fiduciary and make sincere effort to obtain full market value of collateral. In determining whether creditor has discharged his duty, factfinder must consider all aspects of sale of collateral and not

merely any disparity between its market price and value realized from its sale; thus, fact that collateral was sold at public sale is not conclusive of question whether its disposition was commercially reasonable. *United States v. Terrey*, 554 F.2d 685 (5th Cir. Tex. 1977).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer's intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting "commercially reasonable" disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their prior course of dealing and their conduct in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

In view of question whether published notice of sale of repossessed bulldozer might have indicated to casual observer

that sale had already taken place, total absence of evidence about normal commercial practices in disposition of this type of collateral, length of time elapsing between repossession and sale, possibility that bulldozer may have abnormally deteriorated during that period, failure of seller to notify persons who had expressed interest in purchasing equipment of intended sale, and evidence of remarks made by one who may have been taken to be seller's manager indicating his indifference to price for which bulldozer might be sold, jury question was presented as to seller's good faith and commercial reasonableness of every aspect of disposition of collateral. *Farmers Equip. Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972).

The question of whether a conditional seller's letter to the purchaser of a subsequently repossessed automobile to the effect that seven days from the letter's re-

ceipt, and unless the balance due on the contract was paid, the automobile would be sold at private sale constituted reasonable notice under the provisions of subdivision (3) of this section is one for determination by the trier of fact. *Baber v. Williams Ford Co.*, 239 Ark. 1054, 396 S.W.2d 302 (1965).

I. Decisions Under Former Statutes.

67. In general.

Failure to file a statement within 30 days subordinates the holder of a trust receipt to claims of the trustee's creditors. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

A trustor whose trust receipt has not been filed has nevertheless sufficient interest to seek to set aside a sale on execution for a grossly inadequate price. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

RESEARCH REFERENCES

ALR. What constitutes a "public sale." 4 A.L.R.2d 575.

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 A.L.R.2d 539.

Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 A.L.R.2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 A.L.R.4th 1291.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 A.L.R.4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 A.L.R.4th 552.

Failure of secured party to make "commercially reasonable" disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment. 10 A.L.R.4th 413.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3). 11 A.L.R.4th 1060.

Secured transactions: what is "public" or "private" sale under UCC § 9-504(3). 60 A.L.R.4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency. 72 A.L.R.4th 1128.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 624-633.

Rights and remedies of debtor; recovery from secured party for noncompliance; notice of sale not given, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:815, 9:817, 9:819.

Intervention in action by secured party to recover collateral, by owner of collateral

not the debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:81.

Default; Rights and remedies of secured party; to recover deficiency following foreclosure sale, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:683.

Default; rights and remedies of secured party; sale or other disposition of collateral, 6 Am. Jur. Pl Pr Forms (Rev), Secured Transactions, Forms 9:751-9:763.

Default; Rights and remedies of debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:792.

Right of secured party to dispose of collateral after default, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3771 et seq.

4 Am. Jur. Proof of Facts 2d, Secured

Party's Failure to Sell Collateral in Commercially Reasonable Manner, §§ 12 et seq. (proof that secured party's sale of repossessed collateral was not commercially reasonable).

29 Am. Jur. Proof of Facts 2d 711, Secured Transactions — Waiver of Security Interest.

35 Am. Jur. Proof of Facts 2d 517, Sufficiency of Notice of Secured Party's Proposed Disposition of Collateral.

CJS. 79 C.J.S., Secured Transactions §§ 153 et seq.

72 C.J.S., Pledges §§ 53 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-611. Notification before disposition of collateral.

(a) In this section, "notification date" means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification.

(b) Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 75-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.

(c) To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:

(1) The debtor;

(2) Any secondary obligor; and

(3) If the collateral is other than consumer goods:

(A) Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) Any other secured party or lienholder that, ten (10) days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) Identified the collateral;

(ii) Was indexed under the debtor's name as of that date; and

(iii) Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) Any other secured party that, ten (10) days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 75-9-311(a).

(d) Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) A secured party complies with the requirement for notification prescribed by subsection (c)(3)(B) if:

(1) Not later than twenty (20) days or earlier than thirty (30) days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (c)(3)(B); and

(2) Before the notification date, the secured party:

(A) Did not receive a response to the request for information; or

(B) Received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

SOURCES: Derived from former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Obligation of good faith, see § 75-1-203.

Seller's resale of goods following buyer's rejection, see § 75-2-706.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(3).

A. Notice.

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10. —Mailing; undelivered or unclaimed.
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15. —Actual notice.
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17. Parties entitled to notice.
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19. —Guarantor.
20. —Owner of collateral.
21. —Waiver.
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23. —Sale on recognized market.
24. —"Recognized market".
25. Evidence of burden of proof.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(3).

A. Notice.

6. In general; scope.

While § 75-9-504(3) does not require actual notice, but only reasonable notice, a creditor has a duty to make an additional good faith effort to notify the debtor where the creditor knows that the debtor has not received notice. *Fidelity Fin. Servs., Inc. v. Stewart*, 608 So. 2d 1111 (Miss. 1992), on rehearing, (Miss. 1992).

Creditor's notice of public sale of collateral was sufficient under UCC § 9-504(3) to inform reasonable business persons of place of sale where (1) such notice was sent to debtor's office in Dallas, Texas; (2) creditor's attorney, who signed notice, gave Houston, Texas address and phone number; (3) address of place of sale was given as "11601 North Houston-Rosslyn Road," although name of city (Houston) in which sale was to take place was not

given; (4) name of owner of property to be sold was listed on notice as "Compression, Inc. of Houston, Texas"; and with owner of place in Houston, Texas where sale was conducted and thus had not been misled by failure of notice to state that place of sale was located in Houston, (5) that property had been brought to Houston, where demand for it was greatest, (6) that creditor had obtained property for \$100,000 and had later resold it for the same price, (7) that property's subsequent purchaser had refabricated it at some expense and ultimately had obtained only \$140,000 for it, (8) that demand at time of sale for that type of property was not great, and (9) that property's fair-market value (\$150,000) did not render its sale price (\$100,000) grossly inadequate. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), ref. n.r.e (Dec. 6, 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

UCC § 9-504(3) is not applicable to sale of collateral by receiver appointed by court of equity, in case where receiver failed to give debtor timely and proper notice of such sale, since sale was made under court order that the court subsequently confirmed. *Sands v. Citizens & S. Nat'l Bank*, 146 Ga. App. 853, 247 S.E.2d 544 (1978).

Sale of collateral was not commercially reasonable under UCC § 9-504(3) where secured creditor, after debtor's default and after giving debtor notice of intended sale of collateral, which sale was never consummated because bids received were insufficient, sold collateral at second sale but failed to give debtor notice of second sale, as required by UCC § 9-504(3). *Savings Bank v. Booze*, 34 Conn. Supp. 632, 382 A.2d 226 (1977).

Holder of security interest in both real and personal property who chose upon debtors' default to proceed under UCC § 9-504(1) by repossessing and selling inventory without judicial process was bound by UCC § 9-504(3) requirement

that notice of sale be given. *Hildner v. Fox*, 17 Ill. App. 3d 97, 308 N.E.2d 301 (1st Dist. 1974).

Failure to give notice as required by paragraph (3) of this section does not bar the plaintiff from recovery. *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964).

7. Timeliness.

Where secured party mailed notice to debtor on Wednesday of intention to dispose of collateral by private sale the following Monday, such notice was not commercially reasonable under UCC § 9-504(3) as it did not provide debtor minimum of three business days to arrange to protect interest in collateral. *First Nat'l Bank v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977). But see *Old Mill Toyota, Inc. v. Schroder*, 3 N.C.A. 953 (Neb. App. 1993).

Secured party failed to give reasonable notice of sale of repossessed mobile home, where notice of private sale to be held on April 10 was mailed to debtor on April 7 and received by him on April 8, and April 9 was holiday. *Prairie Vista, Inc. v. Casella*, 12 Ill. App. 3d 34, 297 N.E.2d 385 (4th Dist. 1973).

8. Manner of method.

Under UCC § 9-504(3), requiring that notice of intended sale of collateral must be "sent" to debtor, and § 1-201(38), defining word "send," notification of the sale must be in writing. Such written notice will be sufficient under UCC § 9-504(3) if it is either personally delivered to the debtor or sent by mail to the debtor's address. In the latter case, whether or not the debtor receives it will not defeat its sufficiency. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Where secured party's notice of public sale of automobile (the collateral) was posted on two utility poles in two alleys, and also on side of building but nowhere else, manner in which secured creditor gave notice to public of impending "public sale" of vehicle was so woefully inadequate that it, as matter of law, was not commercially reasonable under UCC § 9-504(3). *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

Under UCC § 9-504(3), requiring that reasonable notification of time and place of any public sale of collateral must be sent by secured party to debtor, while word "sent" implies notice sent by mail, all that it actually requires is actual or constructive receipt of notice. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Local newspaper publication a week before sale, with copy of publication being mailed to defendant the day after publication, constituted reasonable notification of sale within UCC § 9-504(3), even though defendant twice refused delivery of mailed notice. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

UCC § 9-504(3) requires more than a general advertisement or a reasonable expectation on the part of the debtor if the notice requirement is to be satisfied. *People v. Brown*, 131 Ill. App. 2d 717, 263 N.E.2d 603 (3d Dist. 1970).

Although only reasonable notification of the time after which a private sale will be made is required, oral notice of a sale to the highest bidder without the specification of any time cannot be said to constitute reasonable notice. *Barker v. Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968).

The Code is silent as to the form of the notice of foreclosure of the collateral and does not state that it must be in writing, or whether it should be given by hand or by registered mail. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

9. —Mailing.

Where secured party mailed notice to debtor on Wednesday of intention to dispose of collateral by private sale the following Monday, such notice was not commercially reasonable under UCC § 9-504(3) as it did not provide debtor minimum of three business days to arrange to protect interest in collateral. *First Nat'l Bank v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977). But see *Old Mill Toyota, Inc. v. Schroder*, 3 N.C.A. 953 (Neb. App. 1993).

Bank dealt with collateral securing promissory note in commercially reasonable manner, where, after defendant had paid only five monthly installments on

note, bank sent notice, which met requirements of UCC § 9-504(3), to defendant by registered mail stating that collateral would be sold at public sale, and thereafter proceeded with commercially reasonable public sale. *Bank of Josephine v. Hopson*, 516 S.W.2d 339 (Ky. 1974).

Conditional seller's notification by certified mail to buyer or his intention to resell repossessed truck was sufficient, and fact that buyer had no actual knowledge of resale is immaterial. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Assignee of security agreement covering conditional sale of auto used certified mail, return receipt requested, to give maker of agreement notice of impending sale; held, this was reasonable notice, notwithstanding maker's testimony disclaiming receipt or knowledge of notice. *Steelman v. Associates Disct. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970).

10. —Mailing; undelivered or unclaimed.

Secured party did not satisfy notice requirements of California version of UCC § 9-504(3), and was therefore precluded from recovering deficiency judgment from debtor, where secured party mailed certified letter addressed to debtor, return receipt requested, where notice was returned unclaimed before sale, and where secured party made no further attempt to notify debtor, although its officers knew his whereabouts and had business dealings with him through branch office. *In re Carter*, 511 F.2d 1203 (9th Cir. Cal. 1975).

Where (1) secured party, on debtor's default in making payments on car, obtained document from debtor in which debtor waived notice of secured party's intended sale of car, (2) secured party, on October 12, 1976, sent letter to debtor by certified mail advising debtor that he could redeem car before such sale, (3) on learning that letter had not been received by debtor, secured party sent debtor second letter on October 19, 1976, which justified debtor's belief that he had until October 29, 1976 to redeem car, and (4) secured party sold car on October 25, 1976, court held (1) that UCC § 9-

501(3)(b) prohibited waiver of notice to debtor, which is required by UCC § 9-504(3), of intended sale of car, (2) that even if it could be assumed, despite prohibition contained in UCC § 9-501(3)(b), that debtor had waived his right to such notice, secured party's attempted sending of notice to debtor by certified mail on October 12, 1976 operated as an abandonment of such waiver, (3) that such abandonment was reinforced by secured party's second notice to debtor on October 19, 1976, and (4) that debtor had right to rely on statements in second notice that he could redeem car until October 29, 1976. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Where (1) after lessee's default, lessor repossessed collateral (leased forklift) and pursuant to UCC § 9-504(3) sent debtor certified letter of notice to address listed on leasing agreement that collateral would be sold, and (2) such letter was marked "unclaimed" and returned to lessor, lessee in action for deficiency judgment after sale of collateral could not successfully contend, in light of UCC § 1-201(26) concerning what constitutes giving of notice and § 1-201(38) concerning sending notice by mail, that lessee was required to receive such notice, and that if it did not receive it, no deficiency judgment could be awarded. *MFT Leasing v. Fillmore Prods., Inc.*, 579 P.2d 924 (1978).

Sufficient notice of private sale of collateral is given under UCC § 9-504(3) when creditor takes such steps as are reasonably required to inform debtor in ordinary course, whether or not debtor actually receives such notice. *Lloyd's Plan, Inc. v. Brown*, 268 N.W.2d 192 (Iowa 1978).

Evidence failed to determine with certainty that reasonable notification required by UCC § 9-504(3) of sale of collateral was given to debtor where creditor testified that notice allegedly given was contained in letter sent by certified mail that was returned unclaimed, debtor testified that he did not receive such letter, and evidence did not show whether letter was returned before or after sale. *Citizen & S. Nat'l Bank v. Morgan*, 142 Ga. App. 337, 235 S.E.2d 767 (1977).

In suit for deficiency judgment against purchaser of boat and trailer who de-

faulted in making payment under retail instalment contract reserving security interest in seller, seller was not entitled to summary judgment where notice of private sale of security was sent to debtor by registered mail and was returned "unclaimed," because debtor is entitled to "reasonable notification" under UCC § 9-504(3) to protect his interests at sale or to redeem under UCC § 9-506 prior to sale; duty of good faith imposed under UCC § 1-203 and defined by UCC § 1-201(19) was not satisfied where notice was sent under UCC § 1-201(38) almost 4 months before sale was held and secured creditor was not entitled to summary judgment without showing of whether notice was returned prior to or after sale. *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974).

Where finance company's registered letter addressed to conditional buyer which purported to give notice of the time, place, and terms of sale of repossessed automobile was returned undelivered, and finance company made no further effort to give the notice required by subsection (3) although it had information as to where the buyer's parents lived and where he was employed, the provisions of the subsection with respect to notice were not complied with, and the sale of the automobile was commercially unreasonable. *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

11. Form.

The Code is silent as to the form of the notice of foreclosure of the collateral, and does not state that it must be in writing. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

12. Sufficiency.

Where (1) certified letters were mailed to debtor and each guarantor advising them that collateral had been repossessed, that they had right of redemption, and that if such right were not exercised by specified date, collateral would be sold, and (2) where such letters were followed by other letters informing debtor and guarantors that collateral had been advertised for sale, court held that such notice of sale of collateral was commercially reasonable and sufficient under UCC § 9-

504(3) and UCC § 1-201(26). *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978).

Jury finding that creditor had conducted public sale of collateral in commercially reasonable manner required by UCC § 9-504(3) was supported by evidence which showed (1) that creditor had advertised sale for two days in Houston, Texas daily newspaper, (2) that it had mailed notices to 19 used-equipment companies, (3) that prospective purchaser from Oklahoma City, Oklahoma, who received one of the mailed notices, had come to Houston and inspected the property, (4) that all but two of the used-equipment companies notified by the creditor had done business (5) debtor produced no evidence that it did not understand or could not deduce place of sale from notice and also failed to show that it had been prejudiced by omission of "Houston, Texas" from address of place of sale. *Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App. 1978), *ref. n.r.e* (Dec. 6, 1978).

Notice to debtor of secured party's proposed disposition of collateral is sufficient under UCC § 9-504(3) where (1) secured party notified debtor that pursuant to UCC § 9-504 and § 9-506, secured party would sell collateral within ten days; (2) such notice also informed debtor about manner of sale, distribution of sales proceeds, and accounting to debtor for any surplus or the seeking of any deficiency; and (3) notice granted debtor ten days to redeem collateral by satisfying indebtedness defaulted on. *Georgia Grain & Stillage Co. v. First Ga. Bank*, 142 Ga. App. 709, 236 S.E.2d 913 (1977).

13. —Public sale.

Where (1) creditor, after debtor's default in making payments on two trucks, sent debtor notice in April, 1975 that trucks would be sold at private sale after time specified in May, 1975, (2) trucks were sold at time specified in such notice, but sale was public and not private, (3) creditor purchased trucks at such sale for amount equal to expenses of conducting sale, and (4) creditor, nine months later, sold trucks at private sale and sued debtor for deficiency judgment for unpaid balance due on trucks, court held (1) that first sale of trucks, which was public sale,

was invalid under UCC § 9-504(3) because notice thereof did not specify time and place of sale, (2) second sale of trucks nine months later at private sale was valid because notice thereof, which had been sent to debtor in April, 1975, constituted reasonable notification under UCC § 9-504(3), provided that test of commercial reasonableness of such sale could be met, and (3) even if at trial of case it should be found that creditor had not conducted sale in commercially reasonable manner, creditor was not thereby deprived of right to deficiency judgment, since debtor under UCC § 9-507(1) could offset any loss sustained as result of creditor's failure to conduct sale in commercially reasonable manner against any deficiency judgment that creditor might obtain. *Associates Fin. Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer's intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting "commercially reasonable" disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their

prior course of dealing and their conduct in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

14. —Private sale.

Where (1) creditor, after debtor's default in making payments on two trucks, sent debtor notice in April, 1975 that trucks would be sold at private sale after time specified in May, 1975, (2) trucks were sold at time specified in such notice, but sale was public and not private, (3) creditor purchased trucks at such sale for amount equal to expenses of conducting sale, and (4) creditor, nine months later, sold trucks at private sale and sued debtor for deficiency judgment for unpaid balance due on trucks, court held (1) that first sale of trucks, which was public sale, was invalid under UCC § 9-504(3) because notice thereof did not specify time and place of sale, (2) second sale of trucks nine months later at private sale was valid because notice thereof, which had been sent to debtor in April, 1975, constituted reasonable notification under UCC § 9-504(3), provided that test of commercial reasonableness of such sale could be met, and (3) even if at trial of case it should be found that creditor had not conducted sale in commercially reasonable manner, creditor was not thereby deprived of right to deficiency judgment, since debtor under UCC § 9-507(1) could offset any loss sustained as result of creditor's failure to conduct sale in commercially reasonable manner against any deficiency judgment that creditor might obtain. *Associates Fin. Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978).

Where seller of automobile repossessed after buyer breached contract, repaired automobile and placed it on lot for sale in ordinary course of business as automobile dealer, such sale was a private one, and not one made at auction or by way of competitive bidding; thus, notice requirements of UCC § 9-504(3) were satisfied by

notice to buyer of time after which collateral was to be sold. *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

In action by bank to recover balance due on promissory note signed by debtor to secure purchase of automobile, trial court erred in directing verdict for bank where bank admittedly did not comply with notice requirements of UCC § 9-504 in telling debtor only that car was to be sold at private sale without mention of specific date, and bank's assertion that debtor's statement that he knew car had been repossessed and debtor's surrender of keys to seller of automobile amounted to admission that debtor had notice that after that time car was subject to private sale did not justify court's ruling that debtor was estopped from asserting lack of notice where testimony conflicted as to whether debtor was told of sale and signed over title before or after sale occurred. *Wheless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974).

15. —Actual notice.

In action to recover deficiency judgment for breach of retail instalment contract for purchase of second-hand front end loader, following resale of loader after buyer's default, where seller gave buyer oral notice of intention to place loader back on its lot and offer it for sale, and where buyer knew where loader was located, why it was being sold and had three months to find buyer or bid on it himself, buyer's actual knowledge of expected sale was sufficient to constitute reasonable notice under UCC § 9-504(3) as sale was private sale of collateral in normal course of seller's business. *Bondurant v. Beard Equip. Co.*, 345 So. 2d 806 (Fla. App. 1977).

The receipt or acquisition of actual knowledge within the time a properly sent notification could have arrived amounts to compliance with the requirement of UCC § 9-504(3), even absent a writing. *Crest Inv. Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972).

Debtor's knowledge that repossessed auto would be sold to satisfy indebtedness did not constitute reasonable notification of time after which creditor could make private sale of auto. *Nelson v. Monarch Inv. Plan, Inc.*, 452 S.W.2d 375 (Ky. 1970).

16. —Constructive notice.

The requirement that a guarantor of a secured party receive the same notice of sale of the collateral as the debtor is entitled to receive (Uniform Commercial Code, § 9-504, subd [3]), is satisfied, where the notice of the dispositional sale of the corporate debtor's assets can properly be imputed to defendant guarantor by reason of her position as the secretary of the small, closely owned and family-operated corporation whose indebtedness she guaranteed. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Notice to corporation president of private sale of repossessed equipment could not be imputed to corporate officers who were accommodation indorsers of note where president was also officer of repossessing equipment supplier, and where repossessor, although aware of this probability of conflict of interest, had not taken "such steps as may be reasonably required to inform the other party in the ordinary course". *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

17. Parties entitled to notice.

An automobile dealer who sells a conditional sales contract to a bank and at the same time executes an assignment which provides that in the event of default he will repurchase the contract for the unpaid balance is a debtor of the bank as defined in ¶ (d) of subd (1) of § 9-105, and where the bank, after repossession, sells the security at private sale without notice to the dealer, subd (3) of this section is not complied with. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Where (1) seller sold computer system under purchase agreement which provided that seller would retain security interest in goods until balance of purchase price was paid, (2) buyer, after taking possession of goods on January 14, 1975, advised seller on January 30, 1975 to repossess them for seller's protection because buyer was in financial difficulty, and (3) seller, after repossessing goods on February 3, 1975, subsequently returned part of them to seller's new-equipment inven-

tory without separately identifying such goods from goods already in inventory and also, without notifying buyer, resold some of the repossessed goods to third persons, court held (1) that seller was limited to remedy of security-interest holder under UCC § 9-504, which governed seller's right to repossess the goods in suit, dispose of them, and apply their proceeds, and (2) that because seller, on reselling some of the goods after their repossession, had failed to give buyer notice of sale required by UCC § 9-504(3), seller under California construction of UCC § 9-504(3) could not recover deficiency on unpaid purchase price from buyer. *Nixdorf Computer, Inc. v. Jet Forwarding, Inc.*, 579 F.2d 1175 (9th Cir. Cal. 1978).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Where assignee (secured party) of equipment lease of drilling machine, on default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to defi-

ciency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

In action by debtor for creditor's wrongful repossession and conversion of collateral, evidence of value of collateral at time it was sold, where creditor did not give debtor notice of sale required by UCC § 9-504(3), was relevant because it went toward proof of conversion. *Ott v. Fox*, 362 So. 2d 836 (Ala. 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months, was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of leasee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1), (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession charges. *Avis Rent-A-Car Sys. v. Franklin*, 82 Misc. 2d 66 (1975).

Plaintiff was entitled to notification of public sale of collateral in which both plaintiff and bank had security interest, and bank was therefore liable for any damages which plaintiff sustained by bank's failure to provide such notice,

where property described in plaintiff's financing statement reasonably identified collateral, and where such financing statement was therefore sufficient to put bank on notice of plaintiff's claim. *Stephens v. Bank of Camilla*, 133 Ga. App. 210, 210 S.E.2d 358 (1974), *aff'd*, 234 Ga. 293, 216 S.E.2d 71 (1975).

Where the corporate maker dishonors the note, a corporate officer who had signed as indorser becomes a debtor entitled to notice under UCC § 9-504. *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

18. —Accommodation parties.

Although bank was permitted to dispose of repossessed automobile without judicial process or notice to co-signer of installment sales contract, bank was not entitled under UCC § 9-504(3) to deficiency judgment against co-signer, where bank failed to give notice to co-signer of intended sale of repossessed automobile. *Washington v. First Nat'l Bank*, 332 So. 2d 644 (Fla. App. 1976).

Secured party was not entitled to recover deficiency judgment from cosigner of note where collateral securing note was repossessed and sold without notice to cosigner. *First State Bank v. Northrop*, 519 S.W.2d 161 (Tex. Civ. App. 1975).

Secured creditor who took possession of collateral, solicited bids, and sold it at private sale was not entitled to recover deficiency judgment against accommodation maker of note where no notice of private sale was given to accommodation party prior to completion of sale as required by UCC § 9-504(3); accommodation maker who signed note to enable makers of note to secure loan from secured party was debtor within meaning of UCC § 9-504(3), and was, thus, entitled to notice of sale. *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974).

Accommodation indorsers are "debtors", entitled to notice from secured party of private sale of ice cream business equipment which was collateral on promissory note. *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

19. —Guarantor.

Where assignee (secured party) of equipment lease of drilling machine, on

default of colessees, repossessed machine and, without giving written notice of any public or private sale thereof to either colessees or lease's guarantors, sold machine more than one year after repossessing it, assignee was not entitled to deficiency judgment because of its failure to act in good faith and in commercially reasonable manner under UCC § 9-504(3). *National Equip. Rental, Ltd. v. Holes, Inc.*, 460 F. Supp. 118 (C.D. Cal. 1978), *aff'd*, 642 F.2d 456 (9th Cir. Cal. 1981).

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), *cert. dismissed*, 362 So. 2d 1056 (Fla. 1978).

Where bank upon default of note and commercial equipment security agreement sold collateral without giving notice to guarantors, under UCC § 9-504(3) failure of secured party to give requisite no-

tice prior to sale or disposition of collateral precluded action for deficiency against guarantor. *Barnett v. Barnett Bank*, 345 So. 2d 804 (Fla. App. 1977), but see *Ayares-Eisenberg Perrine Datsun v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984).

Although plaintiff was not guarantor of loan to corporation, having been released from personal liability on loan, where plaintiff's stock still secured corporate debt and, in event of deficiency, stock was subject to sale, plaintiff was "debtor" to whom notice was owed under UCC § 9-504(3); although creditor failed to give notice prior to sale of collateral, creditor was entitled to collect deficiency if he could prove market value of collateral. *Rushton v. Shea*, 423 F. Supp. 468 (D. Del. 1976).

Guarantors of promissory note secured by collateral were "debtors" within meaning of UCC §§ 9-105(1)(d) and 9-504(3) and were entitled to reasonable notification prior to disposition of collateral by secured party; failure to provide such notice precluded entry of deficiency judgment in action by secured party against guarantors. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. App. 1975).

A guarantor of payment of a secured party is entitled to the same notice of sale of the collateral as the debtor is entitled to (Uniform Commercial Code, § 9-504, subd [3]) since a guarantor is a "debtor" within the meaning of section 9-105 (subd [1], par [d]) of the Uniform Commercial Code which does not require the "debtor" to be the owner or have rights in the collateral. The debtor is only required to be an "obligor in any provision dealing with the obligation". It is imperative for the guarantor to receive notice of the dispositional sale in order to protect his right to reduce his potential liability at the sale. Requiring the secured party to give notice to the guarantor of the disposition of the collateral will not cause the creditor to suffer any prejudice or impose an undue burden. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Guarantor is "debtor" within meaning of UCC § 9-105(1)(d) and § 9-504(3), and thus is entitled to notice of disposition of collateral. *Chase Manhattan Bank v. Natarelli*, 93 Misc. 2d 78 (1977).

Lease of restaurant equipment did not constitute security agreement and, hence, guarantors of lessee's performance of terms of lease were not entitled to notice required by UCC § 9-504(3) where leased equipment was sold at private sale after lessee failed to pay rent and after demand for payment from guarantors had been ignored. *Diaz v. Goodwin Bros. Leasing, Inc.*, 511 S.W.2d 680 (Ky. 1974).

20. —Owner of collateral.

In creditor's action against trustees of dissolved corporation to foreclose mortgage on real property given by such corporation as collateral for note, where (1) complaint alleged that trustees had executed notes as indorsers guaranteeing payment of all of corporation's obligations to plaintiff, (2) after entry of final judgment of foreclosure and sale of realty securing corporation's note, such realty was sold without notice to trustees, (3) plaintiff thereafter filed motion for deficiency judgment against trustees when sale did not fully discharge debt owed to it, and (4) notes given by trustees expressly provided that Uniform Commercial Code applied thereto and that plaintiff would give principal debtor (dissolved corporation) reasonable notice of time and place of any public or private sale of the collateral (realty) for the corporation's note, court (1) affirmed trial court's denial of plaintiff's motion for deficiency judgment because of plaintiff's failure to comply with UCC § 9-504(3), which provides that notice of sale of collateral must be given to debtor prior to such sale, and (2) stated that no basis existed for distinguishing between guarantor of note, after default of the principal debtor (dissolved corporation in present case), and a "debtor" under UCC § 9-504(3), insofar as entitlement to notice before sale of collateral is concerned. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128 (Fla. App. 1978), cert. dismissed, 362 So. 2d 1056 (Fla. 1978).

Since UCC § 9-504(3), requiring secured party to send debtor reasonable notification of sale of collateral, deals with both collateral and the underlying obligation, term "debtor" in UCC § 9-504(3) includes both owner of collateral and obligor when they are not the same person.

Commercial Disct. Corp. v. Bayer, 57 Ill. App. 3d 295, 372 N.E.2d 926, 5 A.L.R.4th 1283 (1st Dist. 1978).

Notice requirement of UCC § 9-504(3) refers to collateral, not to obligation, and "debtor" entitled to notice by that provision is owner of collateral; thus, maker of note was not entitled to notice of sale where automobile given as security for note was owned by his cosigner. *New Haven Water Co. Emp. Credit Union v. Burroughs*, 6 Conn. Cir. Ct. 709, 313 A.2d 82 (1973).

21. —Waiver.

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

Sale of collateral at public auction was void as to debtor where debtor received no notice thereof, as required by UCC § 9-504(3), and waiver of such notice was prohibited by UCC § 9-501(3)(b). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Loan contract which contained provision for waiver of notice of sale of repossessed collateral in violation of UCC § 9-501(3)(b) and § 9-504(3) was not completely void, but merely contained unenforceable provision, where defendant lender did not foreclose on or sell any property of plaintiff debtor and waiver provision was not in any way involved in the litigation between the parties. *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

Where bank loaned debtor money to buy airplanes and loans were secured by such airplanes, and where bank repossessed airplanes because of debtor's failure to make payment, sold them at private sale, and sued guarantors of loans for deficiency judgment under guaranty agreement which unambiguously contained waiver by guarantors that bank could sell or release collateral (airplanes) without notice to guarantors and without affecting their absolute liability, (1) policies underlying UCC § 9-504(3), requiring principal debtor to be given notice of creditor's sale of collateral, would be interpreted as giving guarantor defense to deficiency claim where secured party failed to give principal debtor statutory notice of such sale; (2) such defense was waived by defendant guarantors by express provision in guaranty agreement; and (3) such waiver of notice under UCC § 9-504(3) was not specifically barred by UCC § 9-501(3), since UCC § 9-501(3) applies only to debtors and does not by its terms mandate holding that guarantor is precluded by such section from waiving defense of lack of notice to debtor. *First Nat'l Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. Mont. 1977).

Proper interpretation of UCC § 9-501(3)(b), which is in accordance with policy of UCC § 9-504 to protect rights of debtor, is that nonwaiver provision of UCC § 9-501(3) applies both before and after debtor's default. Thus, UCC § 9-501(3)(b) does not allow waiver by debtor

of his right under UCC § 9-504(3) to reasonable notification of private sale of collateral after debtor's default on underlying obligation. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on "recognized market"; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Under UCC §§ 9-504 and 9-507(2), where individual's guaranty of corporation's demand notes specifically authorized sale of collateral without notice to or further assent from guarantors, sale of collateral was approved by corporation's referee in bankruptcy and no objection was made by trustee in bankruptcy or guarantor at time of sale, naked assertion of impropriety in sale could not overcome presumption that sale of collateral was effectuated in commercially reasonable fashion. *First Nat'l City Bank v. Cooper*, 50 A.D.2d 518 (1st Dep't 1975).

22. Exceptions to notice requirement.

Code section requiring secured party to give reasonable notification to debtor of its intention to dispose collateral is made inoperative by Code § 9-501(4) with respect to watered stock foreclosed as part of real estate security. *Kinoshita v. North Denver Bank*, 181 Colo. 183, 508 P.2d 1264 (1973).

Forty-one head of cattle were not “perishable” or did not threaten to “decline speedily in value” within two weeks from date at which sale was scheduled until date sale was held, so as to excuse “reasonable notification” to junior lienholder as to time and place of sale as required by UCC § 9-504(3). *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099 (D. Neb. 1971).

Failure to give notice to conditional buyer as required by paragraph (3) of this section was not excused in the absence of evidence that a repossessed second-hand pickup truck would threaten to decline speedily in value or was a type of property customarily sold on a recognized market. *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964).

23. —Sale on recognized market.

Bank which as secured creditor purchased collateral at private sale following debtor’s default, but which did not comply with requirement of UCC § 9-504(3) that collateral purchased at private sale must be of type that is customarily sold in recognized market or is subject of widely distributed standard-price quotations, was not entitled to recover deficiency that existed after liquidation of collateral. *Jackson State Bank v. Beck*, 577 P.2d 168 (Wyo. 1978).

Creditor’s default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor’s failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of col-

lateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Foreclosure sale of Mack trucks did not come within notification exception of UCC § 9-504 as to goods of type customarily sold on “recognized market”; recognized market within meaning of UCC is most restrictive and might well be stock market or commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where prices paid in actual sales of comparable property are currently available by quotation. Furthermore, debtor did not waive right to notice of private sale by requesting creditor to repossess trucks to stop interest accruing on notes; under UCC §§ 9-501 and 9-504 waiver will be permitted only if debtor signs statement after default renouncing or modifying his right to notification of sale. *O’Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App. 1975), rev’d, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Repossessed automobiles are not collateral of type sold on recognized market within meaning of UCC provision requiring creditor to give debtor notice of sale of repossessed collateral. *Community Mgt. Ass’n v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973).

A used automobile is not collateral of a type customarily sold on a recognized market, and where it is sold by the holder of a security interest, notice to the debtor is not dispensed with. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

The debtor is not entitled to notice of the foreclosure sale of the collateral where it is of a nature customarily sold on a recognized market. *Third Nat’l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962).

24. —“Recognized market”.

A “recognized market,” as the term is used in subdivision (3) of this section might well be a stock or commodity market, where sales involve many items so

similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation; and notice to the debtor of such sales is dispensed with only because the debtor would not be prejudiced by the want of notice. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds, *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

“Recognized market” refers to widely recognized stock and commodity exchanges which are regulated in some substantial way, but does not include automobile auctions; so that in absence of secured creditor’s giving required notice of sale of repossessed automobile, creditor forfeits his right to any deficiency against any debtor not so notified. *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. App. 1973).

25. Evidence of burden of proof.

Although North Carolina UCC § 9-504(3) does not address the question of burden of proof, a creditor, when suing for a deficiency judgment, nevertheless has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. Likewise, in an action by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. *North Carolina Nat’l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979).

Although secured party under UCC § 9-504(3) need not prove debtor’s receipt of notice of sale of collateral, secured party must show when notice was sent in order to permit determination to be made as to whether notice was sent within commercially reasonable time prior to date after which private sale of collateral would be made. *Commercial Dist. Corp. v. Bayer*, 57 Ill. App. 3d 295, 372 N.E.2d 926, 5 A.L.R.4th 1283 (1st Dist. 1978).

Secured creditor who has liquidated his security may maintain action for deficiency judgment, but such secured creditor has burden to prove that due notice of

sale as provided by law was given to debtor and that sale was commercially reasonable. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep’t 1977).

In action brought by secured creditor against maker and guarantor of note to recover deficiency alleged to be due on note after secured creditor sold collateral, summary judgment in favor of secured creditor was precluded by existence of factual issues concerning propriety of notice of sale and whether sale was conducted in commercially reasonable manner. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep’t 1977).

Secured party who (1) pursuant to UCC § 9-504(1) sold collateral (truck tractor) at private sale for \$1,000, although debtor had borrowed \$25,000 from secured party to buy collateral, (2) did not give debtor notice of sale required by UCC § 9-504(3), and (3) allegedly violated UCC § 9-504(3) by conducting sale in commercially unreasonable manner could maintain action against debtor and guarantor of debtor’s note for deficiency judgment on debtor’s obligation. However, in such case, secured party had burden of proving that due notice of sale had been given to debtor and that sale had been conducted in commercially reasonable manner. Furthermore, even if secured party should fail to present such proof at the trial, he could still recover deficiency judgment by proving amount of debt, fair value of collateral, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep’t 1977).

Compliance with UCC § 9-504(3) for notification as to disposition of collateral security is condition precedent to secured creditor’s right to recovery under UCC § 9-507(1) of any deficiency between sale price of collateral and amount of unpaid balance; burden is on secured party to plead and prove compliance with statutory requirement of notice and of reasonableness of notice. *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492 (Iowa 1977).

Secured parties failed to meet burden of proving compliance with “reasonable notification” requirement of UCC § 9-504(3) where secured parties sent notice of sale only to one out of two debtors by letter, on May 25, 1972, informing him that sale

would be held on June 2, 1972, and where, before sale date, debtors moved to temporarily restrain sale to protect their interest in collateral, but secured parties conducted sale before court's order could be served. Furthermore, sale was not commercially reasonable where only people who attended sale were secured party and one of his former employees, where there was no evidence that secured parties publicized sale in any manner or otherwise took steps to insure best price possible would be obtained for benefit of debtor, secured party placed only bid at sale and purchased collateral for \$100, and where, subsequently, secured parties sold collateral to third party for \$10,000. Although it would be presumed that collateral had fair market value equal to amount of debt and no deficiency would be permitted unless creditor produced evidence to establish reasonable amount that collateral would have sold for at proper sale, and although secured parties had failed to conduct commercially reasonable sale with reasonable notification to debtors, there was substantial evidence that collateral had fair market value of \$10,000 and, thus, secured parties were entitled to deficiency judgment in amount equal to difference between balance owed on promissory note and fair market value of collateral. *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 560 P.2d 917 (1977).

In action by noteholder for deficiency after sale of collateral, noteholder had burden of proving defendant was given proper notice of sale within meaning of UCC § 9-504(3). Notice was misleading, inaccurate and unreasonable where automobile being sold was not present, where defendant was not given opportunity to bid, where no other potential purchasers were present, where alleged "public sale" was held in Chicago law office while collateral was located in another city, and where bids were received at undisclosed price from undisclosed persons. *General Foods Corp. v. Hall*, 39 Ill. App. 3d 147, 349 N.E.2d 573 (1st Dist. 1976).

In action to recover deficiency judgment from debtor and guarantor after sale of property taken by bank under security instruments, where bank disposed of

property in several transactions and in some of transactions failed to give notice of sale as required by UCC § 9-504(3) and in others failed to prove reasonableness of notice, i.e., notice should be sent in such time that debtors would have minimum of three business days to arrange to protect interests, failure to give notice barred recovery of deficiency judgment. *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). But see *Howard Kool Chevrolet v. Blomstedt*, 2 Neb. App. 493, 511 N.W.2d 222 (1994).

Evidence was insufficient to support finding that secured party resold automobile in violation of notice requirement of UCC § 9-504(3) where sale was actually conducted by repairman having garageman's possessory repair lien on vehicle in question, which was superior to secured party's perfected security interest under UCC § 9-310, and where evidence failed to show that repairman sold vehicle in concert with or as agent for secured party. *Magnavox Ft. Wayne Employees Credit Union v. Benson*, 165 Ind. App. 155, 331 N.E.2d 46 (1975).

Judgment in favor of secured creditor for reimbursement of fuel taxes paid to state board of equalization in order to obtain clear title to repossessed trucks before they were sold in satisfaction of debtor's defaulted obligation, was deficiency judgment, since taxes should have been paid out of proceeds of sale before satisfaction of debtor's underlying indebtedness. Accordingly, such judgment required reversal where creditor did not comply with requirements of UCC § 9-504(3), concerning notice of sale, in that notice to debtor did not explicitly set forth exact date, time, and place of sale, but only informed debtor that collateral would be sold at end of seven days from date of letter to debtor and could be inspected at creditor's premises, where no public sale in terms of auction was in fact conducted, and where, even if creditor had complied with notice requirements, it failed to allege or prove such compliance in its complaint. *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474 (2d Dist. 1975).

Although Code does not require that

secured party prove actual receipt of letter notifying debtor of sale, where secured party proved only that envelope had been sent, by introducing certified mail return receipt, and utterly failed to present any evidence as to contents of envelope, he failed to sustain his burden of proving compliance with requirements for notice of disposition. *Tauber v. Johnson*, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1st Dist. 1972), overruled on other grounds, *State Nat'l Bank v. Norwest Dodge, Inc.*, 108 Ill.

App. 3d 376, 64 Ill. Dec. 26, 438 N.E.2d 1345 (1st Dist. 1982).

Conclusory statement that notice "went out in the normal course of business in my office as all mail does each day" is insufficient to prove "reasonable notice" under UCC § 9-504(3) without proof of customary office practice as to stamping, addressing, and posting. *Leasing Assocs. v. Slaughter & Son*, 450 F.2d 174 (8th Cir. Ark. 1971).

RESEARCH REFERENCES

ALR. What constitutes a "public sale." 4 A.L.R.2d 575.

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 A.L.R.2d 539.

Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 A.L.R.2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 A.L.R.4th 1291.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 A.L.R.4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 A.L.R.4th 552.

Failure of secured party to make "commercially reasonable" disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment. 10 A.L.R.4th 413.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

Nature of collateral which secured party may sell or otherwise dispose of

without giving notice to defaulting debtor under UCC § 9-504(3). 11 A.L.R.4th 1060.

Secured transactions: what is "public" or "private" sale under UCC § 9-504(3). 60 A.L.R.4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency. 72 A.L.R.4th 1128.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 624-633.

Rights and remedies of debtor; recovery from secured party for noncompliance; notice of sale not given, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:815, 9:817, 9:819.

Intervention in action by secured party to recover collateral, by owner of collateral not the debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:81.

Default; Rights and remedies of secured party; to recover deficiency following foreclosure sale, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:683.

Default; rights and remedies of secured party; sale or other disposition of collateral, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:751-9:763.

Default; Rights and remedies of debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:792.

Right of secured party to dispose of collateral after default, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3771 et seq.

4 Am. Jur. Proof of Facts 2d, Secured Party's Failure to Sell Collateral in Com-

mercially Reasonable Manner, §§ 12 et seq. (proof that secured party's sale of repossessed collateral was not commercially reasonable).

29 Am. Jur. Proof of Facts 2d 711, Secured Transactions — Waiver of Security Interest.

35 Am. Jur. Proof of Facts 2d 517, Sufficiency of Notice of Secured Party's Pro-

posed Disposition of Collateral.

CJS. 79 C.J.S., Secured Transactions §§ 153 et seq.

72 C.J.S., Pledges §§ 53 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-612. Timeliness of notification before disposition of collateral.

(a) Except as otherwise provided in subsection (b), whether a notification is sent within a reasonable time is a question of fact.

(b) A notification of disposition sent after default and ten (10) days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-613. Contents and form of notification before disposition of collateral: general.

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

- (A) Describes the debtor and the secured party;
- (B) Describes the collateral that is the subject of the intended disposition;
- (C) States the method of intended disposition;
- (D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
- (E) States the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:

- (A) Information not specified by that paragraph; or
 - (B) Minor errors that are not seriously misleading.
- (4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in Section 75-9-614(3), when completed, each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: [Name of debtor, obligor or other person to which the notification is sent]
From: [Name, address and telephone number of secured party]
Name of Debtor(s): [Include only if debtor(s) are not an addressee]

[For a public disposition:]

We will sell (or lease or license, as applicable) the [describe collateral] to the highest qualified bidder in public as follows:

Day and Date: _____

Time: _____

Place: _____

[For a private disposition:]

We will sell (or lease or license, as applicable), the [describe collateral] privately sometime after [day and date].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell (or lease or license, as applicable) (for a charge of \$_____). You may request an accounting by calling us at [telephone number].

[END OF FORM]

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) The information specified in Section 75-9-613(1);

(B) A description of any liability for a deficiency of the person to which the notification is sent;

(C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 75-9-623 is available; and

(D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

Name and address of secured party:

Date:

NOTICE OF OUR PLAN TO SELL PROPERTY

Name and address of any obligor who is also a debtor:

Subject: [Identification of transaction]

We have your: [describe collateral] because you broke promises in our agreement.

[For a public disposition:]

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend the sale and bring bidders if you want.

[For a private disposition]

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe which is then due or past due, (excluding any amount that would not be due except for an acceleration provision), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number], or write us at [secured party's address] and request a written explanation. We will charge you \$_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six (6) months.

If you need more information about the sale call us at [telephone number], or write us at [secured party's address].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:

Names of all other debtors and obligors, if any:

[END OF FORM]

(4) A notification in the form of paragraph (3) is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of paragraph (3) is sufficient, even if it includes errors in information not required by paragraph (1), unless the error is misleading with respect to rights arising under this article.

(6) If a notification under this section is not in the form of paragraph (3), law other than this article determines the effect of including information not required by paragraph (1).

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.

(a) A secured party shall apply or pay over for application the cash proceeds of disposition under Section 75-9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(3).

(c) A secured party need not apply or pay over for application noncash proceeds of disposition under Section 75-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) and permitted by subsection (c):

(1) Unless subsection (a)(4) requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;

(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

SOURCES: Derived from former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002

Cross References — Obligation of good faith, see § 75-1-203.

Seller's resale of goods following buyer's rejection, see § 75-2-706.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(1), (2).

6. In general; creditor's expenses and attorney's fees.

7. Secured debt.

8. —Damages for loss of use.

9. —Interest.

10. Subordinate interests.

11. Surplus.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(1), (2).

6. In general; creditor's expenses and attorney's fees.

Under Uniform Commercial Code Article 9, a security agreement may impose various charges that are not contained in the promissory note, with respect to which the security agreement was made, in the event of the debtor's default on the note. For example, under UCC § 9-504(1)(a)

and § 9-506, the security agreement may provide for the debtor's payment, in the event of default, of the legal expenses and charges for repossession, storage, and redemption of the collateral. Furthermore, a valid acceleration clause in the security agreement can establish, in the event of default, a legal basis for collection from the debtor of both principal and accrued interest on the note. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. Ga. 1978).

A liquidated damage provision in a financing agreement providing that "reasonable attorneys' fees" of 15% of the unpaid balance due are payable upon the acceleration of the entire indebtedness due to the assignor's filing an assignment for the benefit of creditors, is subject to judicial review and modification under the court's inherent right to supervise the charging of fees for legal services as part of the State's strong public policy against the imposition of penalties in the private sector and its duty to protect "all creditors" from any possible mistake or possible overreaching. Courts will not enforce a

liquidated damage provision which fixes damages in an amount “grossly disproportionate” to the harm actually or likely to be sustained by the nonbreaching party. The fixed percentage “attorneys’ fee” is only a “maximum fee” which the creditor may charge only upon first proving the extent of the necessary legal services “actually rendered”. *Coastline Steel Prods., Inc. v. Goldhaber*, 93 Misc. 2d 255 (1978).

Where security agreement provided that on debtor’s default, creditor could retain counsel to protect its interest and collect balance due, and that debtor would pay reasonable counsel fees in amount of 15% of such unpaid balance, court had power to order special hearing (1) to ascertain amount of fees received by creditor’s attorneys, and (2) to determine whether such amount was reasonable under UCC § 9-504(1)(a). *Coastline Steel Prods., Inc. v. Goldhaber*, 93 Misc. 2d 255 (1978).

UCC § 9-504(1)(a) relates to expenses, including attorney’s fees, of liquidating the collateral and does not authorize award of reasonable attorney’s fees for expenses incurred in bringing suit on a collateral promissory note. *Kohlenberg v. American Plumbing Supply Co.*, 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

Reference to attorneys’ fees in UCC §§ 9-504(1)(a) is only to permit recovery where state law recognizes recovery and was not intended to change Nebraska law that attorneys’ fees will be permitted only where state legislature has expressly provided by statute that award of such fees may be made by court; thus, the secured party was not entitled to retain attorneys’ fees from proceeds of sale of collateral as provided in security agreement. *Northwestern Nat’l Bank v. American Beef Packers, Inc.*, 548 F.2d 246 (8th Cir. Neb. 1977).

In action to recover on unpaid promissory notes secured by mortgage on realty, provision in both notes and mortgage that debtor agreed to pay reasonable attorney’s fees arising from default was unenforceable on public policy grounds under well-established rule of Kentucky case law; and such rule was not changed by Kentucky version of UCC § 3-106(1)(e), under which sum payable is “sum certain,” even

though it is to be paid with costs of collection, or attorney’s fee not exceeding 15 percent of amount owing, or \$500, whichever is smaller, since such statute means only that attorney’s fee greater than that allowed by the statute would render instrument indefinite, and therefore nonnegotiable, for failure to contain sum certain. Nor was such provision in notes and mortgage rendered enforceable by UCC § 9-504(1)(a), dealing with secured party’s right to dispose of collateral and apply proceeds to, among other things, “reasonable attorney’s fees” incurred by secured party, since UCC § 9-504(1)(a) applies only to personalty that is used as collateral, and in present case collateral consisted of realty. *Mammoth Cave Prod. Credit Ass’n v. Geraldts*, 551 S.W.2d 5 (Ky. Ct. App. 1977).

Assignee of note and security agreement covering certain equipment did not have right to deduct from proceeds of sale of equipment following its repossession, expenses and attorney’s fees incurred in connection with its repossession and sale under UCC § 9-504 since plaintiff, as assignee, acquired no greater rights against debtor than assignor had against him at time of assignment; assignor had no claim for expenses connected with repossession and sale, or attorney’s fees for such purposes, since such expenses were all incurred by assignee, and, since assignor had not incurred any expenses of repossession, assignee acquired no rights for such expenses under the assignment. *Centennial State Bank v. S.E.K. Constr. Co.*, 518 S.W.2d 143 (Mo. Ct. App. 1974).

Attorney’s fees incurred in enforcing the security interest are properly allowed as authorized by the Code and where also authorized by the particular security agreement. *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. Ark. 1967).

7. Secured debt.

In creditor’s action to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that creditor had improperly conducted foreclosure sale of collateral would be sustained where creditor’s own evidence showed that it had violated UCC § 9-504(1) and (2) by applying proceeds of sale

to pay off senior liens on collateral before satisfying indebtedness secured by security interest under which disposition of collateral was made. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Where corporate debtor obtained numerous pieces of equipment from secured party in four distinct lots, each subject to distinct, but identical, security agreement, where two of these security agreements were guaranteed by individual guarantors, and where, upon default of all four agreements, secured party repossessed all four lots of equipment and sold them as single unit to single purchaser, secured party was not precluded by UCC from collecting deficiency merely because collateral was not sold in lots corresponding to separate lots in which collateral was first acquired by corporate debtor; even if creditor disposes of collateral in violation of UCC, debtor is not entitled to completely avoid its obligations to creditor, but is only entitled to recover "any loss" occasioned by secured party's failure to comply with appropriate provisions of UCC, and individual guarantors offered no evidence that any loss was suffered by corporate debtor because of form of disposition; furthermore, UCC does not require that repossessed collateral be disposed of in any particular manner and there was no evidence to show that sale of collateral in single lot was not disposition made in good faith and in commercially reasonable manner; however, secured party was not entitled to apply proceeds of sale, first to balances due on two security agreements which were not guaranteed, totally satisfying those obligations, and then to balances due on guaranteed security agreements leaving deficiency on them, but was required under UCC § 9-504(1)(b) to apply proceeds of disposition to satisfaction of indebtedness secured by security interest under which disposition was made. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

8. —Damages for loss of use.

Seller of tractor under purchase money security agreement was not entitled to recover damages from buyer for loss of use of tractor during period that tractor was

wrongfully detained by buyer, where seller resold tractor for sum in excess of amount of underlying debt; UCC § 9-504(1) required that proceeds of sale be used to set aside debt, and recovery for loss of use of chattel during period of wrongful detention would effectively amount to double recovery. *Housatonic Tractor Corp. v. Kamins*, 50 A.D.2d 586 (2d Dep't 1975).

Where debtor sold vehicles that were subject to security interest to third party, secured party was entitled, on default, to enforce its right of possession against third party; failure of third party to surrender property immediately upon default and demand prevented secured party from using collateral under UCC § 9-207(4) or reselling or leasing it under UCC § 9-504(1), and third party was liable to secured party for loss of use of property as element of damages. *Long Island Trust Co. v. Porta Aluminum, Inc.*, 49 A.D.2d 579 (2d Dep't 1975).

9. —Interest.

Under Uniform Commercial Code Article 9, a security agreement may impose various charges that are not contained in the promissory note, with respect to which the security agreement was made, in the event of the debtor's default on the note. For example, under UCC § 9-504(1)(a) and § 9-506, the security agreement may provide for the debtor's payment, in the event of default, of the legal expenses and charges for repossession, storage, and redemption of the collateral. Furthermore, a valid acceleration clause in the security agreement can establish, in the event of default, a legal basis for collection from the debtor of both principal and accrued interest on the note. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. Ga. 1978).

A lender whose security agreements provided for the debtor to pay a charge for what the lender contended was a "bonus" or capital payment but what was actually precomputed interest, may not collect that unearned interest from the proceeds of a public auction and sale which followed the debtor's default and acceleration of its indebtedness. *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 94 Misc. 2d 401 (1978).

Prior chattel mortgagee, after chattel mortgagor's default on loans and mortgagee's sale of collateral at public auction, was not entitled to deduct from sale proceeds amounts denominated "bonus" and "charges," so as to deprive subsequent chattel mortgagee of its rightful share, under UCC § 9-504(1)(c) and (2), of sale's proceeds because (1) such "bonus" and "charges" were actually "interest" on prior mortgagee's loan to debtor within meaning of UCC § 3-118(d), and (2) under New York law, lender was not entitled to collect unearned interest on money loaned in absence of subsequent agreement between lender and debtor. *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 94 Misc. 2d 401 (1978).

10. Subordinate interests.

Under UCC § 9-504(5), guarantor of debtor's note, as subrogee to rights of secured party, was successor to all of secured party's rights against debtor, including security interest in debtor's equipment. *Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904 (2d Cir. N.Y. 1978).

Creditor which had perfected security interest in most of debtor's assets on April 3, 1972, by filing proper financing statements, and which subsequently perfected such security interest in all of debtor's assets on January 28, 1975, by taking possession thereof, had under UCC § 9-301(1) and UCC § 9-312 right to assets superior to right of second creditor which did not acquire interest in assets until April 11, 1975, when it levied execution on judgment against debtor and became lien creditor under UCC § 9-301(3). Thus, on debtor's default, first creditor could sell such assets under UCC § 9-504(1) and retain all proceeds of sale when proceeds did not fully satisfy debt owed to such creditor. *GE Co. v. Hol-Gar Mfg. Corp.*, 431 F. Supp. 881 (E.D. Pa. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. Pa. 1978).

In action in nature of interpleader to determine whether secured creditor or feedmen claiming agister's liens were entitled to proceeds from sale of debtor's collateral, where (1) secured creditor, which had perfected its security interest in all of debtor's collateral, peacefully took possession of collateral after debtor's de-

fault and sold it at public auction under UCC § 9-504(1), (2) feedmen's agister liens did not come into existence until after perfection of creditor's security interest, and (3) trial court's judgment in favor of feedmen was based on alleged agreement between secured creditor and feedmen that feedmen, if their claims were paid from the sale's proceeds, would not disrupt sale by announcing to those present that they had lien on property being sold, court would award sale proceeds to secured creditor which clearly had prior right thereto. In such case, even assuming that alleged contract between secured creditor and feedmen had been made, contract was unenforceable because forbearance to exercise nonexistent "right" to interfere with commercially reasonable sale could not constitute valid consideration for such contract. *Agristor Credit Corp. v. Unruh*, 571 P.2d 1220 (Okla. 1977).

Purchasers of assets of tavern business at foreclosure sale were not liable to prior secured party who had unperfected security interest in tavern business assets, notwithstanding prior secured party was not given notice of sale; fact that foreclosure purchasers had knowledge of prior interest in collateral was not by itself evidence of bad faith, as foreclosing party's security interest was superior to prior secured party's security interest, foreclosure purchasers paid substantial price (\$110,000) for assets, and there was no evidence that foreclosure purchasers knew that foreclosing parties failed to give notice required by UCC § 9-504. *Young v. Golden State Bank*, 39 Colo. App. 45, 560 P.2d 855 (1977).

In creditor's action to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that creditor had improperly conducted foreclosure sale of collateral would be sustained where creditor's own evidence showed that it had violated UCC § 9-504(1) and (2) by applying proceeds of sale to pay off senior liens on collateral before satisfying indebtedness secured by security interest under which disposition of collateral was made. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Where corporate debtor obtained numerous pieces of equipment from secured party in four distinct lots, each subject to distinct, but identical, security agreement, where two of these security agreements were guaranteed by individual guarantors, and where, upon default of all four agreements, secured party repossessed all four lots of equipment and sold them as single unit to single purchaser, secured party was not precluded by UCC from collecting deficiency merely because collateral was not sold in lots corresponding to separate lots in which collateral was first acquired by corporate debtor; even if creditor disposes of collateral in violation of UCC, debtor is not entitled to completely avoid its obligations to creditor, but is only entitled to recover "any loss" occasioned by secured party's failure to comply with appropriate provisions of UCC, and individual guarantors offered no evidence that any loss was suffered by corporate debtor because of form of disposition; furthermore, UCC does not require that repossessed collateral be disposed of in any particular manner and there was no evidence to show that sale of collateral in single lot was not disposition made in good faith and in commercially reasonable manner; however, secured party was not entitled to apply proceeds of sale, first to balances due on two security agreements which were not guaranteed, totally satisfying those obligations, and then to balances due on guaranteed security agreements leaving deficiency on them, but was required under UCC § 9-504(1)(b) to apply proceeds of disposition to satisfaction of indebtedness secured by security interest under which disposition was made. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

11. Surplus.

Under UCC § 9-202, legal title to equipment of corporation, if not immaterial, was not decisive as to extent to which equipment could be carried as asset on corporation's balance sheet, even when transaction was cast in terms of lease-purchase option agreement, and in light of UCC § 9-504(2), such equipment represented net asset to extent that its value exceeded any indebtedness secured by it.

Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979).

Under UCC § 9-504(5), guarantor of debtor's note, as subrogee to rights of secured party, was successor to all of secured party's rights against debtor, including security interest in debtor's equipment. *Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904 (2d Cir. N.Y. 1978).

Where stock that was security for loan was surrendered by escrow agent to secured party following debtor's default, at which time its market value was less than amount due on loan, and where secured party sought to recover deficiency, but retained stock and had it registered in secured party's name, actions of secured party did not constitute "otherwise disposing of collateral" within meaning of UCC § 9-504(1) and debtor was entitled to relief under UCC § 9-507 when stock subsequently appreciated in value to amount in excess of secured loan. *In re Copeland*, 531 F.2d 1195 (3d Cir. Del. 1976).

Under UCC § 9-501(3)(a), debtor's right to surplus under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), in the case of a transfer for security as opposed to a sale, cannot be waived by agreement of the parties. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Where (1) plaintiffs sought damages in class action against automobile credit company and automobile dealers for fraudulent and deceptive trade practices allegedly carried on by defendants as part of illegal combination and conspiracy in restraint of trade, in violation of Federal Trade Commission Act and Sherman Anti-Trust Act, and (2) plaintiffs' complaint had as its sole thrust the claim that plaintiffs had been misled into not claiming surplus due them under UCC § 9-504(2) following repossession and resale, after default, of cars purchased by plaintiffs, court held that although plaintiffs might be asserting a wrong and might have a common-law remedy by way of a tort or contract action, defendants' alleged conduct clearly was not intended to restrict competition and did not have effect of restricting it. *Summey v. Ford Motor Credit Co.*, 449 F.

Supp. 132 (D.C.S.C. 1976), aff'd, 573 F.2d 1306 (4th Cir. S.C. 1978).

Where there was no claim that collateral had not been sold in "commercially reasonable" manner as required by UCC § 9-504(3) and where collateral was sold for less than unpaid balance due on note, secured party was not required to account to debtor for surplus resulting from sale of collateral as provided by UCC § 9-504(2). *Panagiotis v. Plummer*, 5 Mass. App. Ct. 821, 362 N.E.2d 555 (1977).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

Under UCC § 9-504 secured creditor must account for any surplus realized from use or sale of collateral in excess of debt secured and under UCC § 9-112 surplus belongs to owner of collateral; thus, in action to obtain accounting from secured party for money or benefit it received from use and sale of equipment it repossessed and for judgment for any amount exceeding note secured by lien agreement on equipment, pleadings sufficiently alleged plaintiff's entitlement to any surplus which might exist where pleading, inter alia, alleged that equipment belonged to plaintiff. *C & L Serv. Co. v. Northern Equip. Co.*, 525 P.2d 1260 (Okla. Ct. App. 1974).

Where secured party repossessed mobile home, which had been purchased by 2

debtors, sold repossession title to one debtor who in turn sold mobile home to third party and third party borrowed money from secured party to make purchase, and where net result of transaction was that secured party canceled balance due on original installment sales contract, \$698.75, paid debtor \$1,502.36, and became creditor of third party for sum of \$2,201.11, transaction amounted to sale of repossessed mobile home to third party for \$2,201.11 leaving surplus of \$1,502.36 and other debtor, who was not given notice of sale, was entitled to one half of surplus. *Morris v. Number 5 Creditthrift of Am., Inc.*, 20 Ill. App. 3d 280, 314 N.E.2d 616 (5th Dist. 1974).

In action by plaintiff-debtor to recover surplus from foreclosure sale of used truck, where truck had been purchased by plaintiff for \$23,500, plaintiff defaulted, and approximately six months after sale to plaintiff truck was resold for \$21,494.40 in cash, plus trade-in allowance of \$7,561.60 on vehicle which was later sold for \$1,400, or total price of \$29,056, surplus in favor of plaintiff should be computed by using actual market value of trade-in vehicle, \$1,400, and not on basis of trade-in allowance. *Webster v. GMAC*, 267 Or. 304, 516 P.2d 1275 (1973) but see *Carlson v. Blumenstein*, 293 Or. 494, 651 P.2d 710 (1982).

Where secured party and cosigner of note failed after repossession of collateral to proceed in accordance with UCC provisions for disposition of collateral upon default, debtor was entitled to recover as damages value of security less debt. *Farmers State Bank v. Otten*, 87 S.D. 161, 204 N.W.2d 178 (1973).

RESEARCH REFERENCES

ALR. What constitutes a "public sale." 4 A.L.R.2d 575.

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 A.L.R.2d 539.

Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 A.L.R.2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

Construction of term “debtor” as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 A.L.R.4th 1291.

What is “commercially reasonable” disposition of collateral required by UCC § 9-504(3). 7 A.L.R.4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 A.L.R.4th 552.

Failure of secured party to make “commercially reasonable” disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment. 10 A.L.R.4th 413.

Sufficiency of secured party’s notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3). 11 A.L.R.4th 1060.

Secured transactions: what is “public” or “private” sale under UCC § 9-504(3). 60 A.L.R.4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency. 72 A.L.R.4th 1128.

Attorneys’ fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 624-633.

Rights and remedies of debtor; recovery from secured party for noncompliance; notice of sale not given, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:815, 9:817, 9:819.

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Default; Rights and remedies of secured party; to recover deficiency following foreclosure sale, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:683.

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Right of secured party to dispose of collateral after default, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3771 et seq.

4 Am. Jur. Proof of Facts 2d, Secured Party’s Failure to Sell Collateral in Commercially Reasonable Manner, §§ 12 et seq. (proof that secured party’s sale of repossessed collateral was not commercially reasonable).

29 Am. Jur. Proof of Facts 2d 711, Secured Transactions — Waiver of Security Interest.

35 Am. Jur. Proof of Facts 2d 517, Sufficiency of Notice of Secured Party’s Proposed Disposition of Collateral.

CJS. 79 C.J.S., Secured Transactions §§ 153 et seq.

72 C.J.S., Pledges §§ 53 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-616. Explanation of calculation of surplus or deficiency.

(a) In this section:

(1) “Explanation” means a writing that:

(A) States the amount of the surplus or deficiency;

(B) Provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency;

(C) States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) Provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

(A) Authenticated by a debtor or consumer obligor;

(B) Requesting that the recipient provide an explanation; and

(C) Sent after disposition of the collateral under Section 75-9-610.

(b) In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 75-9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(B) Within fourteen (14) days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within fourteen (14) days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) If the secured party takes or receives possession of the collateral after default, not more than thirty-five (35) days before the secured party takes or receives possession; or

(B) If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five (35) days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1); and

(6) The amount of the surplus or deficiency.

(d) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors that are not seriously misleading.

(e) A debtor or consumer obligor is entitled without charge to one (1) response to a request under this section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (b)(1). The secured party may require payment of a charge not exceeding Twenty-five Dollars (\$25.00) for each additional response.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-617. Rights of transferee of collateral.

(a) A secured party's disposition of collateral after default:

(1) Transfers to a transferee for value all of the debtor's rights in the collateral;

(2) Discharges the security interest under which the disposition is made; and

(3) Discharges any subordinate security interest or other subordinate lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the collateral subject to:

(1) The debtor's rights in the collateral;

(2) The security interest or agricultural lien under which the disposition is made; and

(3) Any other security interest or other lien.

SOURCES: Derived from former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Priority of a lien to secure payment of oil or gas royalty proceeds, see § 53-3-41.

Obligation of good faith, see § 75-1-203.

Seller's resale of goods following buyer's rejection, see § 75-2-706.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(4).

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-504(4).

6. In general.

In action by retail furniture dealer which had entered into agreement with defendant financier, under which plaintiff transferred its accounts receivable to defendant in exchange for, being provided with funds in specified proportion to accounts defendant accepted from plaintiff, to recover sums held in reserve account

established by parties' agreement, (1) plaintiff's accounts receivable were not sold to defendant, but were transferred to it as collateral security within meaning of UCC § 9-502(2) in exchange for line of credit defendant extended to plaintiff; (2) as a result, under UCC § 9-502(2) and § 9-504(2) (which are identical provisions), defendant was required to account for, and to turn over to plaintiff, any surplus collected by defendant on the transferred accounts, and plaintiff in turn was liable for any deficiency on such accounts; and (3) surplus held by defendant on loan owed by plaintiff and deficiency on such loan were cross-obligations that must be set off against each other. *Major's Furn. Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff'd*, 602 F.2d 538 (3d Cir. Pa. 1979).

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured

party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

In action by plaintiff against two former business associates seeking damages for alleged conspiracy to appropriate stock which plaintiff had pledged to bank as security for loan, where, after plaintiff defaulted, bank sold stock to defendants pursuant to repurchase agreement executed in connection with loan transaction: (1) after default, plaintiff still had legal title to stock, subject to bank's lien which could have been extinguished by public sale as provided in UCC; (2) to recover stock from bank, plaintiff was required to make valid tender of amount of debt, plus accrued interest, as condition precedent to right to maintain suit; (3) under UCC § 9-504(5), when bank conveyed stock to defendants in accord with their repurchase agreement, defendants became subrogated to rights and duties of bank and, hence, plaintiff's action against defendants was barred by his failure to make such tender or to show any excuse or justification therefor. *Barnett v. Maida*, 503 S.W.2d 610 (Tex. Civ. App. 1973), *writ ref'd n.r.e.*, (May 22, 1974).

Auto dealer sold car to defendant-buyer for net sum of \$1700; dealer assigned sales contract to plaintiff-assignee; plaintiff-assignee repossessed auto and sold it back to dealer for \$348; dealer resold auto for \$1050; held, \$348 transaction was mere transfer, not sale or disposition, of collateral; therefore, notice of this transaction to defendant-buyer could not comply with requirement of "reasonable notification of time and place" of sale of repossessed collateral, and plaintiff-assignee could not recover balance due on contract, where defendant-buyer had not been notified of resale of auto for \$1050. *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138 (1969).

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Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 A.L.R.4th 1291.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 A.L.R.4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 A.L.R.4th 552.

Failure of secured party to make "commercially reasonable" disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment. 10 A.L.R.4th 413.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3). 11 A.L.R.4th 1060.

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Rights and remedies of debtor; recovery from secured party for noncompliance; notice of sale not given, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:815, 9:817, 9:819.

Intervention in action by secured party to recover collateral, by owner of collateral not the debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:81.

Default; Rights and remedies of secured party; to recover deficiency following foreclosure sale, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:683.

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4 Am. Jur. Proof of Facts 2d, Secured Party's Failure to Sell Collateral in Commercially Reasonable Manner, §§ 12 et seq. (proof that secured party's sale of repossessed collateral was not commercially reasonable).

29 Am. Jur. Proof of Facts 2d 711, Secured Transactions — Waiver of Security Interest.

35 Am. Jur. Proof of Facts 2d 517, Sufficiency of Notice of Secured Party's Proposed Disposition of Collateral.

CJS. 79 C.J.S., Secured Transactions §§ 153 et seq.

72 C.J.S., Pledges §§ 53 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-9-618. Rights and duties of certain secondary obligors.

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

(1) Receives an assignment of a secured obligation from the secured party;

(2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or

(3) Is subrogated to the rights of a secured party with respect to collateral.

(b) An assignment, transfer, or subrogation described in subsection (a):

(1) Is not a disposition of collateral under Section 75-9-610; and

(2) Relieves the secured party of further duties under this article.

SOURCES: Derived from former 1972 Code § 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

§ 75-9-619. Transfer of record or legal title.

(a) In this section, “transfer statement” means a record authenticated by a secured party stating:

(1) That the debtor has defaulted in connection with an obligation secured by specified collateral;

(2) That the secured party has exercised its post-default remedies with respect to the collateral;

(3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and

(4) The name and mailing address of the secured party, debtor, and transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

(1) Accept the transfer statement;

(2) Promptly amend its records to reflect the transfer; and

(3) If applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) A transfer of the record or legal title to collateral to a secured party under subsection (b) or otherwise is not of itself a disposition of collateral under this article and does not of itself relieve the secured party of its duties under this article.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.

(a) Except as otherwise provided in subsection (g), a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) The debtor consents to the acceptance under subsection (c);

(2) The secured party does not receive, within the time set forth in subsection (d), a notification of objection to the proposal authenticated by:

(A) A person to which the secured party was required to send a proposal under Section 75-9-621; or

(B) Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) Subsection (e) does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to Section 75-9-624.

(b) A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) are met.

(c) For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

(A) Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) Does not receive a notification of objection authenticated by the debtor within twenty (20) days after the proposal is sent.

(d) To be effective under subsection (a)(2), a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to Section 75-9-621, within twenty (20) days after notification was sent to that person; and

(2) In other cases:

(A) Within twenty (20) days after the last notification was sent pursuant to Section 75-9-621; or

(B) If a notification was not sent, before the debtor consents to the acceptance under subsection (c).

(e) A secured party that has taken possession of collateral shall dispose of the collateral pursuant to Section 75-9-610 within the time specified in subsection (f) if:

(1) Sixty percent (60%) of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) Sixty percent (60%) of the principal amount of the obligation secured has been paid in the case of a nonpurchase-money security interest in consumer goods.

(f) To comply with subsection (e), the secured party shall dispose of the collateral:

(1) Within ninety (90) days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures.

SOURCES: Derived from former 1972 Code § 75-9-505 [Codes, 1942, § 41A:9-505; Laws, 1966, ch. 316, § 9-505; Laws, 1977, ch. 452, § 35, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-505.

6. In general.
7. Scope.
8. Retention of collateral in satisfaction of obligation.
9. Notice of intent to retain collateral.
10. Objection by debtor.
11. Debtor's claim against secured party.
12. Claim of secured party against debtor after sale of collateral.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-505.

6. In general.

Where note was accompanied by security agreement which granted security interest in all property of debtor in secured party's possession as security for all obligations owed by debtor, secured party,

on default on note, clearly had right under UCC § 9-503 to take possession of all property of debtor in secured party's possession, and exercise of this right did not result in conversion of such collateral by secured party, since situation did not involve applicability of UCC § 9-505(1), which provides that if debtor has paid 60 percent of loan, secured party who has taken possession of collateral consisting of consumer goods must dispose of such collateral within 90 days or face liability for conversion. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

UCC § 9-505 is applicable only to a security interest in consumer goods. In *re Tops Cleaners, Inc.*, 20 Pa. D. & C.2d 264 (1960).

7. Scope.

A secured party who is in possession of collateral that is not subject to the obligations imposed by UCC § 9-505(1) may seek judgment on the debt and forego recourse against the collateral, since under UCC § 9-501(1), the secured party's

rights and remedies are cumulative. Except in the special case covered by UCC § 9-505(1), the Uniform Commercial Code does not require a secured party in possession of collateral to apply it to the reduction of the debt. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

In lessor's suit for damages for lessee's default under personal property leasing agreement, where it was not established as matter of law that lease instrument created security interest in leased property or was anything other than a straight lease, rather than a memorandum showing a secured transaction, UCC § 9-504 and § 9-505, dealing with secured party's disposition of collateral, were inapplicable. *Robinson v. Granite Equip. Leasing Corp.*, 553 S.W.2d 633 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 5, 1977).

Indorsers of a note give by a conditional buyer to a conditional seller are not discharged under subsection (2) of this section either by the seller's acceptance of a dividend under an assignment for benefit of creditors by the buyer, or by the seller's repossessing and selling on behalf of the assignee of the note the property conditionally sold, where the seller made no proposal to keep the collateral in satisfaction of his obligation, subsection (2) being applicable only where such a proposal is made. *Priggen Steel Bldgs. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966).

A cash register company did not lose its right to enforce its claim for the final two monthly instalments due from its creditor under a twenty-two monthly payment bailment lease by failure to sell the cash register within 90 days, since the cash register was not consumer goods. In *re Tops Cleaners, Inc.*, 20 Pa. D. & C.2d 264 (1960).

8. Retention of collateral in satisfaction of obligation.

Where (1) bank had perfected security interest in original debtor corporation's inventory, fixtures, and equipment, including after-acquired property, which was superior to lien later obtained by junior lienor under promissory note secured by same collateral, (2) original debtor corporation defaulted on notes given to bank (senior lienor) and to junior lienor, (3) junior lienor without informing

bank took over assets of original debtor corporation, transferred them to newly former corporation, began selling the original inventory which had become commingled with new inventory, and, with respect to original debtor corporation's assets, filed foreclosure complaint against bank and former owners of original debtor corporation alleging that he had taken possession of original debtor corporation's property, subject to bank's security interest, and was seeking to discharge obligation owed to bank in order to become owner of such property, and (4) bank filed complaint in replevin and took possession of collateral, trial court's judgment in favor of bank which held that bank's security interest was at all times paramount to junior lienor's lien, that after-acquired property clause in bank's security agreement with original debtor corporation covered items that junior lienor had added in his operation of business under new corporation, and that bank should sell collateral, satisfy its own security interest from sale proceeds, and give remaining proceeds to junior lienor was affirmed because (1) bank's after-acquired property clause effectively covered inventory and proceeds of both original debtor corporation and new corporation, (2) bank's security interest continued in collateral, including after-acquired property, under UCC § 9-306(2) and § 9-311, which must be read together, and (3) since junior lienor, on default of original debtor corporation, did not proceed in accordance with UCC § 9-505(2) in attempting to retain collateral, disposition of collateral ordered by trial court was proper. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

Under UCC Article 9, secured party has two relevant options after repossessing goods of defaulting debtor. Under UCC § 9-505(2), secured party can retain collateral in satisfaction of debtor's obligation. Alternatively, under UCC § 9-504(1), secured party can sell repossessed goods, apply sale price to indebtedness, and look to debtor for any deficiency. However, UCC § 9-504(3) requires that any sale under that section must be commercially reasonable. *National Equip. Rental, Ltd. v. Priority Elecs. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977).

Where evidence in conversion action showed that plaintiff purchased motorcycle under instalment contract giving seller security interest in vehicle; that seller assigned contract for value and with full recourse to bank, which filed contract of record on July 31, 1972; that purchaser defaulted in making payments in October, 1973; that seller paid balance due on vehicle to bank and bank orally reassigned contract to seller on April 4, 1974; that seller then paid third party's bill for repairs to vehicle and repossessed vehicle from such party; and that purchaser instituted action against seller after failing to repay seller for amounts paid out on vehicle, (1) seller on buying contract back from bank became secured party entitled to self-help repossession under UCC § 9-503; (2) seller did not convert vehicle by paying repair bill and repossessing vehicle, since such action was authorized by debtor-redemption provisions of UCC § 9-506; and (3) conversion claim based on seller's alleged violation of UCC § 9-505 also failed because it was not made until final argument at trial. *Eustice v. Brazille*, 567 P.2d 92 (Okla. 1977).

Where there were questions of fact as to (1) whether secured party, by holding collateral for a period of time in excess of five years, had exceeded reasonable length of time secured party may hold collateral before it is deemed to have exercised its right to retain that collateral in satisfaction of obligation and (2) whether secured party knew that stock belonged to party other than its debtor, motion by secured party for summary judgment would be denied inasmuch as favorable disposition of these two issues would entitle loan guarantor who had pledged stock as collateral for loan to recover damages under UCC § 9-507 against secured party for its violation of notice guarantees contained in UCC §§ 9-112(b) and 9-505(2). *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. 1976).

Repossession and disposition procedures used by secured party did not comply with those provided in Article 9 of UCC where, after repossessing automobiles, notice of sale was sent by registered mail to each defaulting purchaser advising him that his car would be sold at

public auction to highest bidder on specified date for not less than specified minimum amount, where only public notice of sale was blackboard placed in office of secured party listing date of sale, initials of defaulting purchaser, and year and make of automobile, where secured party did not conduct sale at public auction, as stated in notice of sale, but on date of sale credited debtor's account with minimum price stated in notice of sale and then proceeded to collect deficiency by taking judgment on cognovit notes signed by debtors, and where secured party then obtained repossession titles for automobiles involved and resold them from its used car lot, at retail, to other consumers at substantially higher prices than amounts credited. Although UCC § 9-505(2) authorizes secured party in possession of repossessed goods to retain those goods in satisfaction of debtor's obligations, provided written notice of such intention is sent to debtor and debtor does not object within 30 days, and although debtors in present case made no objection to proceedings, secured party did not comply with provisions of UCC § 9-504 and, thus, was not entitled to deficiency judgment as permitted under UCC § 9-504(2). *Miles v. N.J. Motors, Inc.*, 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975).

Debt was discharged when secured party, after debtor's default in payments, repossessed truck, used it for purposes other than its preservation, and did not initiate suit on debt for period of approximately 4 months. *Moran v. Holman*, 514 P.2d 817 (Alaska 1973).

9. Notice of intent to retain collateral.

In order for a secured party to retain the collateral in satisfaction of the indebtedness, the requirements of UCC § 9-505(2) must be followed. Under this section, a secured party who proposes to retain the collateral must first notify the debtor and other secured parties of the plan. And if a person entitled to notice objects, the sale provisions of UCC § 9-504 then become applicable. *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223 (8th Cir. Mo. 1978).

Secured party who proposed after debtor's default to retain collateral in satisfaction of the obligation, but who failed to give debtor written notice of such proposal

as required by UCC § 9-505(2), could not retain collateral since waiver of such notice is expressly prohibited by UCC § 9-501(3)(c). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Although strict compliance with the written notice provisions of UCC § 9-505(2) may not be essential where the debtor is claiming that the secured party has retained the collateral to satisfy the obligation, the creditor should in some way manifest an intent to accept the collateral in full satisfaction of such obligation. The better interpretation of UCC § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain the collateral in satisfaction of the debt in certain specified situations where he manifests that intent. A debtor who has been damaged by improper retention of collateral has a remedy in UCC § 9-507(1), which allows him to recover from the secured party any loss caused by a failure to comply with any of the default provisions of Part 5 of UCC Article 9. If the loss experienced by the debtor equals the amount due under the obligation, the secured party, of course, will be entitled to no recovery. The debtor is sufficiently protected by UCC § 9-507(1) without employing a strained reading of UCC § 9-505(2) to imply retention of collateral in satisfaction of the debt where no such result was intended by the secured party. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

Where defaulting debtors were not given notice by secured creditor of intent to retain collateral in satisfaction of debt but were given notice of intent to enforce security interest by means of sale of pledged collateral, and defaulting debtors

then resisted secured party's exercise of that right, causing secured party to seek writ of mandate which ultimately effectuated sale, secured party's actions in achieving sale did not constitute rescission and satisfaction of debt under UCC 9-505(2) so as to bar further recovery thereon. *Stensvad v. Miners & Merchants Bank*, 163 Mont. 409, 517 P.2d 715 (1973).

Secured party cannot retain collateral unless he gives notice to debtor; where notice required by UCC § 9-505 was not given receiver of collateral has option of allowing secured party to retain collateral in full satisfaction of underlying obligation or of ordering sale pursuant to UCC § 9-504. *Brownstein v. Fiberonics Indus., Inc.*, 110 N.J. Super. 43, 264 A.2d 262 (1970).

The creditor's failure to give notice of intention to retain the collateral in discharge of the debt does not prevent the debtor from showing that the collateral was in fact retained by the creditor and on the basis of such fact he may claim that he is discharged from further liability. The giving of notice protects the creditor from a subsequent claim that he should have sold the collateral. *Northern Fin. Corp. v. Chatwood Coffee Shop, Inc.*, 4 U.C.C. Rep. Serv. 674 (1967, NY Sup).

Secured party in possession of collateral who fails to give written notice as to his proposed retention of collateral to debtor or to other secured party, has no legal right to retain collateral. In *re Sports Autos, Inc.*, 117 Pitts. Legal J. 199 (Pa. 1969).

10. Objection by debtor.

In action against secured creditor, by guarantor of debts secured by pledged stock certificates, defaulting debtors, including guarantor, could not rely on UCC § 9-505(2) to contend that creditor's sale of pledged collateral constituted rescission and satisfaction of debt where debtors were given notice of intent to enforce security interest by means of sale of pledged collateral and debtors then resisted creditor's exercise of that right, causing creditor to seek writ of mandate to effect sale. *Stensvad v. Miners & Mer-*

chants Bank, 163 Mont. 409, 517 P.2d 715 (1973).

11. Debtor's claim against secured party.

Where on September 22, 1976, bank repossessed automobile given as collateral for loan to debtor and where, as of June 17, 1977, bank had not disposed of collateral and debtor had repaid more than 60 per cent of loan, debtor as provided by UCC § 9-505(1) was entitled to recover from bank either for conversion or under UCC § 9-507(1), governing creditor's liability for failure to comply with provisions of UCC Article 9. *Marshall v. Fulton Nat'l Bank*, 145 Ga. App. 190, 243 S.E.2d 266 (1978).

Where note was accompanied by security agreement which granted security interest in all property of debtor in secured party's possession as security for all obligations owed by debtor, secured party, on default on note, clearly had right under UCC § 9-503 to take possession of all property of debtor in secured party's possession, and exercise of this right did not result in conversion of such collateral by secured party, since situation did not involve applicability of UCC § 9-505(1), which provides that if debtor has paid 60 percent of loan, secured party who has taken possession of collateral consisting of consumer goods must dispose of such collateral within 90 days or face liability for conversion. *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978).

Where secured party and cosigner of note failed after repossession of collateral

to proceed in accordance with UCC provisions for disposition of collateral upon default, debtor was entitled to recover as damages value of security less debt. *Farmers State Bank v. Otten*, 87 S.D. 161, 204 N.W.2d 178 (1973).

12. Claim of secured party against debtor after sale of collateral.

A security holder who has repossessed a truck under a defaulted conditional sales contract is required to liquidate it at reasonable public sale as a condition of seeking further recovery from the conditional purchaser; and the conditional purchaser's obligation is limited to whatever deficiency remains after such a sale. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

In the absence of evidence that following the repossession of a truck under a defaulted sales contract the collateral was sold and that a deficiency resulted, the security holder has no claim against the conditional purchaser. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

Where an assignee of a conditional sales contract which repossessed an automobile on conditional buyer's default in making of payments sold the automobile four days after repossession in violation of Mass GL c. 255, § 11, there was a breach of contract by such assignee, precluding the maintenance of an action for deficiency predicated upon the resale. *Associates Disct. Corp. v. Girard*, 19 Mass. App. Dec. 95 (1960).

RESEARCH REFERENCES

ALR. Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 A.L.R.2d 15.

Construction and operation of UCC § 9-505(2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation. 55 A.L.R.3d 651.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 713-729.

Default; acceptance of collateral in satisfaction of obligation, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:771-9:775.

Default; rights and remedies of debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:791, 9:792.

Compulsory discharge of collateral; acceptance of collateral as discharge of obligation, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3791 et seq.

CJS. 72 C.J.S., Pledges §§ 49 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-9-621. Notification of proposal to accept collate.

(a) A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, ten (10) days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) Identified the collateral;

(B) Was indexed under the debtor's name as of that date; and

(C) Was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, ten (10) days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 75-9-311(a).

(b) A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a).

SOURCES: Derived from former 1972 Code § 75-9-505 [Codes, 1942, § 41A:9-505; Laws, 1966, ch. 316, § 9-505; Laws, 1977, ch. 452, § 35, eff from and after April 1, 1978] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-505(4).

6. Retention of collateral in satisfaction of obligation.

7. Notice of intent to retain collateral.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-505(4).

6. Retention of collateral in satisfaction of obligation.

Where (1) bank had perfected security interest in original debtor corporation's inventory, fixtures, and equipment, including after-acquired property, which was superior to lien later obtained by junior lienor under promissory note secured by same collateral, (2) original

debtor corporation defaulted on notes given to bank (senior lienor) and to junior lienor, (3) junior lienor without informing bank took over assets of original debtor corporation, transferred them to newly former corporation, began selling the original inventory which had become commingled with new inventory, and, with respect to original debtor corporation's assets, filed foreclosure complaint against bank and former owners of original debtor corporation alleging that he had taken possession of original debtor corporation's property, subject to bank's security interest, and was seeking to discharge obligation owed to bank in order to become owner of such property, and (4) bank filed complaint in replevin and took possession of collateral, trial court's judgment in favor of bank which held that bank's security interest was at all times paramount to junior lienor's lien, that after-acquired property clause in bank's security agree-

ment with original debtor corporation covered items that junior lienor had added in his operation of business under new corporation, and that bank should sell collateral, satisfy its own security interest from sale proceeds, and give remaining proceeds to junior lienor was affirmed because (1) bank's after-acquired property clause effectively covered inventory and proceeds of both original debtor corporation and new corporation, (2) bank's security interest continued in collateral, including after-acquired property, under UCC § 9-306(2) and § 9-311, which must be read together, and (3) since junior lienor, on default of original debtor corporation, did not proceed in accordance with UCC § 9-505(2) in attempting to retain collateral, disposition of collateral ordered by trial court was proper. *American Heritage Bank & Trust Co. v. O. & E., Inc.*, 40 Colo. App. 306, 576 P.2d 566 (1978).

Under UCC Article 9, secured party has two relevant options after repossessing goods of defaulting debtor. Under UCC § 9-505(2), secured party can retain collateral in satisfaction of debtor's obligation. Alternatively, under UCC § 9-504(1), secured party can sell repossessed goods, apply sale price to indebtedness, and look to debtor for any deficiency. However, UCC § 9-504(3) requires that any sale under that section must be commercially reasonable. *National Equip. Rental, Ltd. v. Priority Elecs. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977).

Where evidence in conversion action showed that plaintiff purchased motorcycle under instalment contract giving seller security interest in vehicle; that seller assigned contract for value and with full recourse to bank, which filed contract of record on July 31, 1972; that purchaser defaulted in making payments in October, 1973; that seller paid balance due on vehicle to bank and bank orally reassigned contract to seller on April 4, 1974; that seller then paid third party's bill for repairs to vehicle and repossessed vehicle from such party; and that purchaser instituted action against seller after failing to repay seller for amounts paid out on vehicle, (1) seller on buying contract back from bank became secured party entitled to self-help repossession under UCC § 9-

503; (2) seller did not convert vehicle by paying repair bill and repossessing vehicle, since such action was authorized by debtor-redemption provisions of UCC § 9-506; and (3) conversion claim based on seller's alleged violation of UCC § 9-505 also failed because it was not made until final argument at trial. *Eustice v. Brazille*, 567 P.2d 92 (Okla. 1977).

Where there were questions of fact as to (1) whether secured party, by holding collateral for a period of time in excess of five years, had exceeded reasonable length of time secured party may hold collateral before it is deemed to have exercised its right to retain that collateral in satisfaction of obligation and (2) whether secured party knew that stock belonged to party other than its debtor, motion by secured party for summary judgment would be denied inasmuch as favorable disposition of these two issues would entitle loan guarantor who had pledged stock as collateral for loan to recover damages under UCC § 9-507 against secured party for its violation of notice guarantees contained in UCC §§ 9-112(b) and 9-505(2). *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. 1976).

Repossession and disposition procedures used by secured party did not comply with those provided in Article 9 of UCC where, after repossessing automobiles, notice of sale was sent by registered mail to each defaulting purchaser advising him that his car would be sold at public auction to highest bidder on specified date for not less than specified minimum amount, where only public notice of sale was blackboard placed in office of secured party listing date of sale, initials of defaulting purchaser, and year and make of automobile, where secured party did not conduct sale at public auction, as stated in notice of sale, but on date of sale credited debtor's account with minimum price stated in notice of sale and then proceeded to collect deficiency by taking judgment on cognovit notes signed by debtors, and where secured party then obtained repossession titles for automobiles involved and resold them from its used car lot, at retail, to other consumers at substantially higher prices than amounts credited. Although UCC § 9-

505(2) authorizes secured party in possession of repossessed goods to retain those goods in satisfaction of debtor's obligations, provided written notice of such intention is sent to debtor and debtor does not object within 30 days, and although debtors in present case made no objection to proceedings, secured party did not comply with provisions of UCC § 9-504 and, thus, was not entitled to deficiency judgment as permitted under UCC § 9-504(2). *Miles v. N.J. Motors, Inc.*, 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975).

Debt was discharged when secured party, after debtor's default in payments, repossessed truck, used it for purposes other than its preservation, and did not initiate suit on debt for period of approximately 4 months. *Moran v. Holman*, 514 P.2d 817 (Alaska 1973).

7. Notice of intent to retain collateral.

In order for a secured party to retain the collateral in satisfaction of the indebtedness, the requirements of UCC § 9-505(2) must be followed. Under this section, a secured party who proposes to retain the collateral must first notify the debtor and other secured parties of the plan. And if a person entitled to notice objects, the sale provisions of UCC § 9-504 then become applicable. *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223 (8th Cir. Mo. 1978).

Secured party who proposed after debtor's default to retain collateral in satisfaction of the obligation, but who failed to give debtor written notice of such proposal as required by UCC § 9-505(2), could not retain collateral since waiver of such notice is expressly prohibited by UCC § 9-501(3)(c). *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526, 11 A.L.R.4th 1054 (4th Dist. 1978).

Although strict compliance with the written notice provisions of UCC § 9-505(2) may not be essential where the debtor is claiming that the secured party has retained the collateral to satisfy the obligation, the creditor should in some way manifest an intent to accept the collateral in full satisfaction of such obligation. The better interpretation of UCC § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain the collateral in satisfaction of the debt in cer-

tain specified situations where he manifests that intent. A debtor who has been damaged by improper retention of collateral has a remedy in UCC § 9-507(1), which allows him to recover from the secured party any loss caused by a failure to comply with any of the default provisions of Part 5 of UCC Article 9. If the loss experienced by the debtor equals the amount due under the obligation, the secured party, of course, will be entitled to no recovery. The debtor is sufficiently protected by UCC § 9-507(1) without employing a strained reading of UCC § 9-505(2) to imply retention of collateral in satisfaction of the debt where no such result was intended by the secured party. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Proceeds from disposition of pledged bonds in excess of amount owed to creditors, who had security interests under UCC §§ 9-203 and 9-204, belonged under UCC §§ 9-502 and 9-504 to debtors, and creditors were not entitled to retain entire collateral under UCC § 9-505 in absence of compliance with notice requirement under UCC § 9-505. *Kelman v. Bohi*, 27 Ariz. App. 24, 550 P.2d 671 (1976).

Where defaulting debtors were not given notice by secured creditor of intent to retain collateral in satisfaction of debt but were given notice of intent to enforce security interest by means of sale of pledged collateral, and defaulting debtors then resisted secured party's exercise of that right, causing secured party to seek writ of mandate which ultimately effectuated sale, secured party's actions in achieving sale did not constitute rescission and satisfaction of debt under UCC 9-505(2) so as to bar further recovery thereon. *Stensvad v. Miners & Merchants Bank*, 163 Mont. 409, 517 P.2d 715 (1973).

Secured party cannot retain collateral unless he gives notice to debtor; where notice required by UCC § 9-505 was not given receiver of collateral has option of allowing secured party to retain collateral in full satisfaction of underlying obligation or of ordering sale pursuant to UCC § 9-504. *Brownstein v. Fiberonics Indus., Inc.*, 110 N.J. Super. 43, 264 A.2d 262 (1970).

The creditor's failure to give notice of intention to retain the collateral in dis-

charge of the debt does not prevent the debtor from showing that the collateral was in fact retained by the creditor and on the basis of such fact he may claim that he is discharged from further liability. The giving of notice protects the creditor from a subsequent claim that he should have sold the collateral. *Northern Fin. Corp. v. Chatwood Coffee Shop, Inc.*, 4 U.C.C. Rep.

Serv. 674 (1967, NY Sup).

Secured party in possession of collateral who fails to give written notice as to his proposed retention of collateral to debtor or to other secured party, has no legal right to retain collateral. *In re Sports Autos, Inc.*, 117 Pitts. Legal J. 199 (Pa. 1969).

RESEARCH REFERENCES

ALR. Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 A.L.R.2d 15.

Construction and operation of UCC § 9-505(2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation. 55 A.L.R.3d 651.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 713-729.

Default; acceptance of collateral in satisfaction of obligation, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:771-9:775.

Default; rights and remedies of debtor, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:791, 9:792.

Compulsory discharge of collateral; acceptance of collateral as discharge of obligation, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3791 et seq.

CJS. 72 C.J.S., Pledges §§ 49 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-9-622. Effect of acceptance of collateral.

(a) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a), even if the secured party fails to comply with this article.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-623. Right to redeem collateral.

(a) A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral then due or past due (excluding any sums that would not be due except for an acceleration provision); and

(2) The reasonable expenses and attorney's fees described in Section 75-9-615(a)(1).

(c) A redemption may occur at any time before a secured party:

- (1) Has collected collateral under Section 75-9-607;
- (2) Has disposed of collateral or entered into a contract for its disposition under Section 75-9-610; or
- (3) Has accepted collateral in full or partial satisfaction of the obligation it secures under Section 75-9-622.

SOURCES: Derived from former 1972 Code § 75-9-506 [Codes, 1942, § 41A:9-506; Laws, 1966, ch. 316, § 9-506, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-506.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-506.

6. In general.

Debtor, by tendering all past due sums and expenses, has right to reinstate secured installment obligation after notice of default and acceleration by creditor where creditor seeks only judgment and not possession of collateral, based on long-standing policy of Mississippi to protect collateral. *Rankin Properties, Ltd. v. Woodhollow Estates*, 714 F. Supp. 800 (S.D. Miss. 1989).

Debtor who, upon tendering purchase price to redeem mobile home which has been repossessed by secured creditor, refuses tender of new home which to rational person would be more valuable and desirable than one originally sold to and occupied by debtor, is not entitled to damages. *Dungan v. Dick Moore, Inc.*, 463 So. 2d 1094 (Miss. 1985).

Debtor's right to redemption of personal property subject to security interest is governed by Uniform Commercial Code (§ 75-9-506), not by § 89-1-59, which applies only to secured installment transactions which are not covered by Code. *Dungan v. Dick Moore, Inc.*, 463 So. 2d 1094 (Miss. 1985).

Under uniform commercial code Article 9, a security agreement may impose vari-

ous charges that are not contained in the promissory note, with respect to which the security agreement was made, in the event of the debtor's default on the note. For example, under UCC § 9-504(1)(a) and § 9-506, the security agreement may provide for the debtor's payment, in the event of default, of the legal expenses and charges for repossession, storage, and redemption of the collateral. Furthermore, a valid acceleration clause in the security agreement can establish, in the event of default, a legal basis for collection from the debtor of both principal and accrued interest on the note. *Matter of Sprouse*, 1978, 577 F. 2d 989

Under UCC § 9-506, the debtor, in order to redeem, must tender fulfillment of "all obligations" as well as the "expenses reasonably incurred" by the secured party in retaking, holding, and preparing the collateral for disposition and in arranging for its sale. The secured party is obviously in a superior position to determine the amount of "all obligations" and "expenses reasonably incurred," and when he declares the amount due, the debtor or a party acting on his behalf is entitled to rely on that declaration. *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880 (Ala. 1978).

The words "unless otherwise agreed in writing after default" in UCC § 9-506 do not mean that an agreement to pay an amount less than the sum of the items set out in UCC § 9-506 must be in writing to constitute a valid redemption. *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880 (Ala. 1978).

Although UCC § 9-501(3)(d) provides that the debtor's right to redeem may not

be varied or waived before default, the language “unless otherwise agreed in writing after default” in UCC § 9-506 does permit the debtor, after default, to waive or vary his right to redeem by an agreement in writing. *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880 (Ala. 1978).

Debtor’s right under UCC § 9-506 to redeem collateral was not extinguished where secured party, after repossession of collateral, had not disposed of it or contracted for its disposal, and had also not effectively accepted it in satisfaction of debtor’s obligation. *Credit Alliance Corp. v. Adams Constr. Corp.*, 570 S.W.2d 283 (Ky. 1978).

In determining whether defaulting Small Business Administration debtor had right to redeem collateral given to secure loan made by creditor, which right was waived by express provision in both debtor’s mortgage on certain realty and also in security agreement covering certain personal property of debtor, in absence of federal statutory law on subject, question whether language in mortgage and security agreement waiving such right or Illinois statute (UCC § 9-506) prohibiting such waiver should govern would be determined by weighing all relevant factors, including intent of parties and interest of both federal and state governments. Of these factors, the most important is whether state law can be given effect without either conflicting with federal policy or destroying needed uniformity in pertinent federal law in its operation within the various states. *United States v. Marshall*, 431 F. Supp. 888 (N.D. Ill. 1977).

In suit in which Small Business Administration (creditor) obtained summary judgment as to debtor’s liability under mortgage on certain realty and under security agreement covering certain personal property, which instruments were executed to secure loan made to debtor, (1) where both mortgage and security agreement provided that debtor waived right to redeem collateral; (2) where there was no federal statutory law on right of Small Business Administration debtors to redeem their property; and (3) where as result of Illinois’ adoption of UCC § 9-506,

debtor’s right of redemption could not be waived in Illinois in either mortgage or security agreement, validity of debtor’s waiver would be determined under Illinois law since (1) Illinois’ interest in protecting debtors’ redemption rights did not conflict with federal policy underlying Small Business Administration Act; (2) Illinois system protected debtor by posing economic threat to prospective purchasers at foreclosure sale, including plaintiff in present case, that artificially low bid could be defeated by redemption; (3) allowing right of redemption would encourage policy of helping small businessmen to survive foreclosure; and (4) such policy was more important than need for uniform application of Small Business Administration program. *United States v. Marshall*, 431 F. Supp. 888 (N.D. Ill. 1977).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer’s intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting “commercially reasonable” disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their prior course of dealing and their conduct

in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

Where evidence in conversion action showed that plaintiff purchased motorcycle under instalment contract giving seller security interest in vehicle; that seller assigned contract for value and with full recourse to bank, which filed contract of record on July 31, 1972; that purchaser defaulted in making payments in October, 1973; that seller paid balance due on vehicle to bank and bank orally reassigned contract to seller on April 4, 1974; that seller then paid third party's bill for repairs to vehicle and repossessed vehicle from such party; and that purchaser instituted action against seller after failing to repay seller for amounts paid out on vehicle, (1) seller on buying contract back from bank became secured party entitled to self-help repossession under UCC § 9-503; (2) seller did not convert vehicle by paying repair bill and repossessing vehicle, since such action was authorized by debtor-redemption provisions of UCC § 9-506; and (3) conversion claim based on seller's alleged violation of UCC § 9-505 also failed because it was not made until final argument at trial. *Eustice v. Brazille*, 567 P.2d 92 (Okla. 1977).

Attorney's fees incurred in enforcing the security interest are properly allowed as authorized by the Code and where also

authorized by the particular security agreement. *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. Ark. 1967).

Where the debtor's interest in the collateral is sold at foreclosure sale the buyer has only such right of possession and of retention as was possessed by the debtor. *Scholz Homes, Inc. v. Joseph*, 4 U.C.C. Rep. Serv. 1104 (1967, NY Co Ct).

A provision by which the debtor waives the right to redeem the collateral is void. *Indianapolis Morris Plan Corp. v. Karlen*, 4 U.C.C. Rep. Serv. 791 (1967, NY Sup).

A security holder who disposes of collateral without notice denies to the debtor his right of redemption which is provided to him in the instant section. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

Where a finance company failed to give the automobile dealer notice where it sold automobiles removed from the dealer's place of business, the finance company could not recover from the dealer for losses sustained on sales of automobiles and the expenses of such sales. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

Where an assignee of a conditional sales contract which repossessed an automobile on conditional buyer's default in making of payments sold the automobile four days after repossession in violation of Mass GL c. 255, § 11, there was a breach of contract by such assignee, precluding the maintenance of an action for deficiency predicated upon the resale. *Associates Dist. Corp. v. Girard*, 19 Mass. App. Dec. 95 (1960).

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Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 564 et seq.

Rights and remedies of debtor; redemption of collateral, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:801, 9:802.

Right of debtor to redeem collateral, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3811 et seq.

CJS. 79 C.J.S., Secured Transactions § 184.

72 C.J.S., Pledges §§ 47-48.

§ 75-9-624. Waiver.

(a) A debtor or secondary obligor may waive the right to notification of disposition of collateral under Section 75-9-611 only by an agreement to that effect entered into and authenticated after default.

(b) A debtor may waive the right to require disposition of collateral under Section 75-9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Section 75-9-623 only by an agreement to that effect entered into and authenticated after default.

SOURCES: Derived from former 1972 Code §§ 75-9-504 [Codes, 1942, § 41A:9-504; Laws, 1966, ch. 316, § 9-504; Laws, 1970, ch. 272, § 1; Laws, 1977, ch. 452, § 34, eff from and after April 1, 1978], 75-9-505 [Codes, 1942, § 41A:9-505; Laws, 1966, ch. 316, § 9-505; Laws, 1977, ch. 452, § 35, eff from and after April 1, 1978], and 75-9-506 [Codes, 1942, § 41A:9-506; Laws, 1966, ch. 316, § 9-506, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

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Where the debtor's interest in the collateral is sold at foreclosure sale the buyer has only such right of possession and of retention as was possessed by the debtor. *Scholz Homes, Inc. v. Joseph*, 4 U.C.C. Rep. Serv. 1104 (1967, NY Co Ct).

A provision by which the debtor waives the right to redeem the collateral is void. *Indianapolis Morris Plan Corp. v. Karlen*, 4 U.C.C. Rep. Serv. 791 (1967, NY Sup).

A security holder who disposes of collateral without notice denies to the debtor his right of redemption which is provided to him in the instant section. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

Where a finance company failed to give the automobile dealer notice where it sold automobiles removed from the dealer's place of business, the finance company could not recover from the dealer for losses sustained on sales of automobiles and the expenses of such sales. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

Where an assignee of a conditional sales contract which repossessed an automobile on conditional buyer's default in making of payments sold the automobile four days after repossession in violation of Mass GL c. 255, § 11, there was a breach of contract by such assignee, precluding the maintenance of an action for deficiency predicated upon the resale. *Associates Dist. Corp. v. Girard*, 19 Mass. App. Dec. 95 (1960).

RESEARCH REFERENCES

ALR. Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 564 et seq.

Rights and remedies of debtor; redemption of collateral, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:801, 9:802.

Right of debtor to redeem collateral, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 9 — Secured Transactions, §§ 253:3811 et seq.

CJS. 79 C.J.S., Secured Transactions § 184.

72 C.J.S., Pledges §§ 47-48.

SUBPART 2.

NONCOMPLIANCE WITH ARTICLE.

SEC.

- 75-9-625. Remedies for secured party's failure to comply with article.
- 75-9-626. Action in which deficiency or surplus is in issue.
- 75-9-627. Determination of whether conduct was commercially reasonable.
- 75-9-628. Nonliability and limitation on liability of secured party; liability of secondary obligor.

§ 75-9-625. Remedies for secured party's failure to comply with article.

(a) If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in Section 75-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price.

(d) A debtor whose deficiency is eliminated under Section 75-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Section 75-9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover Five Hundred Dollars (\$500.00) in each case from a person that:

(1) Fails to comply with Section 75-9-208;

(2) Fails to comply with Section 75-9-209;

(3) Files a record that the person is not entitled to file under Section 75-9-509(a) and fails to file a termination statement with respect to the filed record within ten (10) days after receiving an authenticated demand by the debtor, consumer obligor, or person named as a debtor in the filed record;

(4) Fails to cause the secured party of record to file or send a termination statement as required by Section 75-9-513(a) or (c);

(5) Fails to comply with Section 75-9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with Section 75-9-616(b)(2).

(f) A debtor or consumer obligor may recover damages under subsection (b) and, in addition, Five Hundred Dollars (\$500.00) in each case from a person that, without reasonable cause, fails to comply with a request under Section 75-9-210. A recipient of a request under Section 75-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Section 75-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

SOURCES: Derived from former 1972 Code § 75-9-507 [Codes, 1942, § 41A:9-507; Laws, 1966, ch. 316, § 9-507, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Injunctions, generally, see §§ 11-13-1 et seq.
Obligation of good faith, see § 75-1-203.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-507.

6. In general.

7. Parties and standing.

8. Pleadings.

9. Damages.

10. —Measure and elements.

11. —Evidence and burden of proof; secured party.

12. —Evidence and burden of proof; debtor.

13. Deficiency judgment as affected by non-compliance.

14. —Non-compliance as bar.

15. —Setoff of debtor's damages.

16. —Evidence and burden of proof.

17. Commercial reasonableness.

18. —Particular dispositions reasonable.

19. —Particular dispositions not reasonable.

20. —Judicially-approved dispositions.

21. —Evidence and burden of proof.

I. Under Current Law.**1.-5. [Reserved for future use.]****II. Under former § 75-9-507.****6. In general.**

Where on September 22, 1976, bank repossessed automobile given as collateral for loan to debtor and where, as of June 17, 1977, bank had not disposed of collateral and debtor had repaid more than 60 per cent of loan, debtor as provided by UCC § 9-505(1) was entitled to recover from bank either for conversion or under UCC § 9-507(1), governing creditor's liability for failure to comply with provisions of UCC Article 9. *Marshall v. Fulton Nat'l Bank*, 145 Ga. App. 190, 243 S.E.2d 266 (1978).

Although strict compliance with the written notice provisions of UCC § 9-505(2) may not be essential where the debtor is claiming that the secured party has retained the collateral to satisfy the obligation, the creditor should in some way manifest an intent to accept the collateral in full satisfaction of such obligation. The better interpretation of UCC § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain the collateral in satisfaction of the debt in certain specified situations where he manifests that intent. A debtor who has been damaged by improper retention of collateral has a remedy in UCC § 9-507(1), which allows him to recover from the secured party any loss caused by a failure to comply with any of the default provisions of Part 5 of UCC Article 9. If the loss experienced by the debtor equals the amount due under the obligation, the secured party, of course, will be entitled to no recovery. The debtor is sufficiently protected by UCC § 9-507(1) without employing a strained reading of UCC § 9-505(2) to imply retention of collateral in satisfaction of the debt where no such result was intended by the secured party. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

In light of remedy afforded by UCC § 9-507 to conditional vendees, there is no reason for extending the doctrine of conversion (*custodia legis*) to a conditional

vendor. *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. Okla. 1970).

An actual lease of personal property which does not give the lessee any right to acquire or purchase is not a security device and accordingly, the lessee's rights after the lessor's repossession upon his default are not determined by Article 9 of the Code. *Franklin Nat'l Bank v. Katzel*, 4 U.C.C. Rep. Serv. 124 (1967, NY Sup).

Since the UCC has abolished the technical distinctions between the various security devices, the federal bankruptcy courts should no longer feel compelled to engage in the purely theoretical exercise of locating "title"; nor should considerations of where "title lies" influence the courts in the exercise of their equitable discretion in ruling upon a security holder's petition for reclamation of collateral. *In re Yale Express Sys.*, 370 F.2d 433 (2d Cir. N.Y. 1966).

7. Parties and standing.

Sellers of tavern business who had valid, but unperfected, security interest in assets of business presented *prima facie* case of loss caused by lack of notice under UCC § 9-507(1) where banks that had subsequent, but perfected, security interests in assets of tavern business foreclosed and sold assets to third party, where there was undisputed testimony that banks and third party were aware of sellers' security interest and banks in fact agreed to indemnify third party against claims arising from original security agreement, where banks failed to give notice as required by UCC § 9-504, and where debt owing to banks at time of foreclosure was approximately \$45,000, but foreclosure sale grossed \$110,000, and difference was unaccounted for. *Young v. Golden State Bank*, 39 Colo. App. 45, 560 P.2d 855 (1977).

Where there were questions of fact as to (1) whether secured party, by holding collateral for a period of time in excess of five years, had exceeded reasonable length of time secured party may hold collateral before it is deemed to have exercised its right to retain that collateral in satisfaction of obligation and (2) whether secured party knew that stock belonged to party other than its debtor, motion by secured party for summary judgment would be

denied inasmuch as favorable disposition of these two issues would entitle loan guarantor who had pledged stock as collateral for loan to recover damages under UCC § 9-507 against secured party for its violation of notice guarantees contained in UCC §§ 9-112(b) and 9-505(2). *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. 1976).

Plaintiff was entitled to notification of public sale of collateral in which both plaintiff and bank had security interest, and bank was therefore liable for any damages which plaintiff sustained by bank's failure to provide such notice, where property described in plaintiff's financing statement reasonably identified collateral, and where such financing statement was therefore sufficient to put bank on notice of plaintiff's claim. *Stephens v. Bank of Camilla*, 133 Ga. App. 210, 210 S.E.2d 358 (1974), *aff'd*, 234 Ga. 293, 216 S.E.2d 71 (1975).

A person offering to pay a higher price for part of the collateral does not have any standing to intervene in a proceeding to determine the commercial reasonableness of the sale of the collateral. *Old Colony Trust Co. v. Penrose Indus. Corp.*, 387 F.2d 939 (3d Cir. Pa. 1968), *cert. denied*, 392 U.S. 927, 88 S. Ct. 2283, 20 L. Ed. 2d 1385 (1968).

8. Pleadings.

Under UCC §§ 9-504 and 9-507(2), where individual's guaranty of corporation's demand notes specifically authorized sale of collateral without notice to or further assent from guarantors, sale of collateral was approved by corporation's referee in bankruptcy and no objection was made by trustee in bankruptcy or guarantor at time of sale, naked assertion of impropriety in sale could not overcome presumption that sale of collateral was effectuated in commercially reasonable fashion. *First Nat'l City Bank v. Cooper*, 50 A.D.2d 518 (1st Dep't 1975).

Where the secured party after repossessing a boat sold it without giving specific notice to the purchasers as to the time and place of sale, the purchasers were entitled to recover on their counterclaim based on a failure to comply with this section, even though poorly pleaded, where the secured party had been given

sufficient notice that the section was involved. It was not necessary that the statute be specifically pleaded, and that the boat was consumer goods might be inferred from the uncontradicted testimony of the purchasers as to their occupations. *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960).

9. Damages.

UCC § 9-507(1) does not entitle a debtor, simply because the collateral is consumer goods, to at least a minimum recovery where the creditor gives notice of a proposed disposition of collateral that is commercially unreasonable but then fails to dispose of it. The statute is not intended to punish a creditor and recompense a debtor unless the debtor has been injured. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), *writ granted*, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), *rev'd*, 587 S.W.2d 668 (Tex. 1979).

Even if secured party failed to comply with provisions of UCC § 9-504(3), debtor would not be discharged from all liability under contract, but would rather be entitled under UCC § 9-507(1) to recover for damages caused thereby. *Stanchi v. Kemp*, 48 A.D.2d 973 (3d Dep't 1975).

Where automobile dealer did not give debtors notice of sale of repossessed automobile, it was liable to debtors for damages as provided in Code § 9-507(1). *Community Mgt. Ass'n v. Tousley*, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Where secured party gave no notice of private sale of repossessed collateral, debtors could recover any loss caused by secured party's failure to comply with UCC. *Crowder v. Allied Inv. Co.*, 190 Neb. 487, 209 N.W.2d 141 (1973).

Where finance company failed to give notice of sale of repossessed automobile as required by § 9-504(3), suit for a deficiency judgment against debtor was remanded for determination of the amount due the company, if any, after allowing the debtor the off sets provided by this section. *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

Where the conditional buyer of a secondhand pickup truck was not given notice of sale where such notice was required under § 9-504(3) he was entitled to re-

cover as a set-off or counterclaim the amount of his resulting damages in an action brought against him for a deficiency judgment. *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964).

10. —Measure and elements.

Failure of secured party after repossession of automobile to give debtor notice of private sale as required by UCC § 9-504(3) did not work absolute forfeiture of debtor's indebtedness to secured party, since security agreement provided that debtor would be liable for deficiency after application of proceeds of sale as provided by UCC § 9-504(2); failure to give notice did, however, entitle debtor to recover from secured party any actual loss caused by such failure and, in case of sale of consumer goods such as automobile, debtor also had right to recover "amount not less than the credit service charge plus ten per cent (10%) of the principal amount of the debt or the time price differential plus ten per cent (10%) of the cash price" pursuant to UCC § 9-507(1). Furthermore, failure to give required statutory notice imposed upon creditor burden of establishing that sale was made in conformity with "reasonable commercial practices" as required by UCC § 9-507(2) and that sum received for chattel represented its fair market value. *Walker v. V.M. Box Motor Co.*, 325 So. 2d 905 (Miss. 1976).

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of

home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

Common-law rule that failure to notify debtor of sale of collateral does not release debtor but merely affords him credit for any loss caused by creditor's failure to notify, is codified in UCC § 9-507(1). *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978).

UCC § 9-507(1) provides that a secured party who proposes to dispose of collateral in an unreasonable manner may be restrained from doing so by court order. The statute also provides for damages where an unreasonable disposition has been effected and, in the case of an unreasonable disposition of consumer goods, prescribes a minimum recovery. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), rev'd, 587 S.W.2d 668 (Tex. 1979).

Under UCC § 9-507(1), the recovery of damages is measured by the economic loss that was sustained by reason of a failure to comply with the default provisions of Article 9. *Bundrick v. First Nat'l Bank*, 570 S.W.2d 12 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Nov. 29, 1978).

Although strict compliance with the written notice provisions of UCC § 9-505(2) may not be essential where the debtor is claiming that the secured party has retained the collateral to satisfy the obligation, the creditor should in some way manifest an intent to accept the collateral in full satisfaction of such obliga-

tion. The better interpretation of UCC § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain the collateral in satisfaction of the debt in certain specified situations where he manifests that intent. A debtor who has been damaged by improper retention of collateral has a remedy in UCC § 9-507(1), which allows him to recover from the secured party and loss caused by a failure to comply with any of the default provisions of Part 5 of UCC Article 9. If the loss experienced by the debtor equals the amount due under the obligation, the secured party, of course, will be entitled to no recovery. The debtor is sufficiently protected by UCC § 9-507(1) without employing a strained reading of UCC § 9-505(2) to imply retention of collateral in satisfaction of the debt where no such result was intended by the secured party. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Secured party's failure to give debtor notice of time and place of sale of collateral, as required by UCC — 9-504(3), will not release debtor from any deficiency that may exist after the sale. In such case, however, debtor under UCC § 9-507(1) may receive credit or recover damages for any loss that he sustained as result of such failure to notify. *Zions First Nat'l Bank v. Hurst*, 570 P.2d 1031 (Utah 1977).

Although UCC does not explicitly allow punitive damages for commercially unreasonable sale, if that right exists outside Code, it is retained or permitted through UCC § 1-106, and since UCC permits recovery of damages in action for conversion of repossessed property, punitive damages are recoverable in such action where secured party's acts are wanton, malicious, and intentional; thus, evidence that secured party permitted third person to borrow collateral belonging to debtor prior to default in order that third party could open competing business, that bank did not give proper notice of sale and on sale date did not even attempt sale, that secured party retained collateral after default for several months without crediting it against debtor's note, and that final sale was made to third person for price less than one fourth of stipulated value of

property at time of sale, was sufficient to support award of punitive damages. *Davidson v. First Bank & Trust Co.*, 609 P.2d 1259 (Okla. 1976).

Where stock that was security for loan was surrendered by escrow agent to secured party following debtor's default, at which time its market value was less than amount due on loan, and where secured party sought to recover deficiency, but retained stock and had it registered in secured party's name, actions of secured party did not constitute "otherwise disposing of collateral" within meaning of UCC § 9-504(1) and debtor was entitled to relief under UCC § 9-507 when stock subsequently appreciated in value to amount in excess of secured loan. *In re Copeland*, 531 F.2d 1195 (3d Cir. Del. 1976).

Where testimony was in substantial agreement that there was no widespread market for used restaurant equipment, particularly kind specifically designed for use of particular franchise, and all parties testified that they knew of no standard price quotations for such equipment, such collateral was not of type that could have been validly purchased by secured party at private sale under UCC § 9-504(3) and such purchase by secured party violated UCC §§ 9-501 and 9-507; debtor was not entitled to statutory penalty under UCC § 9-507(1) since that minimum recovery applies only to cases involving consumer goods under UCC § 9-109 and used restaurant equipment did not fall within that definition, rather, presumption would be indulged that collateral was worth at least amount of debt, shifting to secured party burden of proving amount that should reasonably have been obtained through sale conducted according to law and, taken in that light, evidence supported determination of trial court that price obtained upon sale of collateral was reasonable and that debtor suffered no compensable damage, entitling secured party to deficiency judgment. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Where secured party and cosigner of note failed after repossession of collateral to proceed in accordance with UCC provisions for disposition of collateral upon default, debtor was entitled to recover as damages value of security less debt.

Farmers State Bank v. Otten, 87 S.D. 161, 204 N.W.2d 178 (1973).

Statutory damages under UCC § 9-507(1) are not cumulative for each asserted violation of Part 5 of UCC Article 9 and may be recovered only once. *Crosby v. Basin Motor Co.*, 83 N.M. 77, 488 P.2d 127 (Ct. App. 1971).

11. —Evidence and burden of proof; secured party.

Where secured creditor who has liquidated his security fails to sustain his burden of proving that due notice of sale of collateral as provided by law was given to debtor and that sale of collateral was commercially reasonable, debtor may still recover deficiency judgment by proving amount of debt, fair value of security, and resulting deficiency. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Creditor's failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Used restaurant equipment for which there was no widespread market was presumed to be worth at least amount of debt, and secured party had burden of proving that amount received for such equipment was reasonable. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Where secured party did not comply with Code provision regarding notice of sale after repossession, usual measure of damages is difference between what collateral was sold for and what it would have been sold for if proper notice had been given; burden of proving value of collateral received at sale is on secured party in deficiency action; held, where burden is not met, value is presumed to be at least amount of debt. *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

Where a debtor has the right to recover any loss caused by failure of a secured party to comply with statutory provisions in disposing of the collateral, there is a presumption the collateral is worth at least the amount of the debt in such cases,

so the secured party has the burden of proving the amount that should reasonably have been obtained through a sale. *Barker v. Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968).

12. —Evidence and burden of proof; debtor.

Debtor who alleged that secured party had sold repossessed collateral without sending debtor notice required by UCC § 9-504(3), but who did not show that collateral was consumer goods or that he had sustained identifiable loss as result of secured party's failure to notify, was not entitled to penalty imposed by UCC § 9-507(1) for such failure to notify. *Hensley v. Lubbock Nat'l Bank*, 561 S.W.2d 885 (Tex. Civ. App. 1978).

Action by lessor of computer for deficiency following lessee's default on written lease agreement was not precluded by fact that lessor failed to give lessee notice of resale following repossession as required by UCC § 9-504(3); lessor was entitled to recover entire balance due under lease, where lessee offered no proof of loss resulting from lessor's failure to give notice as provided in UCC § 9-507. *Leasco Computer, Inc. v. Sheridan Indus., Inc.*, 82 Misc. 2d 897 (1975).

Despite insufficiency of notice of sale under UCC § 9-504(3) for failure to specify time after which private sale was to be made, secured party was entitled to deficiency judgment against defendant purchaser of snowmobiles who defaulted on payment where defendant-purchaser failed to establish any damage by virtue of "method, manner, time and terms" of sale under UCC § 9-507(2) because competitive bid method utilized by secured party was commercially reasonable under circumstances, defendant had voluntarily relinquished possession of collateral because he had been unable to sell snowmobiles, purpose of relinquishment was to allow plaintiff secured party to sell them, and defendant had notice of plaintiff's intention to sell snowmobiles, made no response, and was financially unable to take any action. *Commercial Credit Corp. v. Wollgast*, 11 Wash. App. 117, 521 P.2d 1191 (1974), review denied, 84 Wash. 2d 1004 (1974).

Where corporate debtor obtained numerous pieces of equipment from secured party in four distinct lots, each subject to distinct, but identical, security agreement, where two of these security agreements were guaranteed by individual guarantors, and where, upon default of all four agreements, secured party repossessed all four lots of equipment and sold them as single unit to single purchaser, secured party was not precluded by UCC from collecting deficiency merely because collateral was not sold in lots corresponding to separate lots in which collateral was first acquired by corporate debtor; even if creditor disposes of collateral in violation of UCC, debtor is not entitled to completely avoid its obligations to creditor, but is only entitled to recover "any loss" occasioned by secured party's failure to comply with appropriate provisions of UCC, and individual guarantors offered no evidence that any loss was suffered by corporate debtor because of form of disposition; furthermore, UCC does not require that repossessed collateral be disposed of in any particular manner and there was no evidence to show that sale of collateral in single lot was not disposition made in good faith and in commercially reasonable manner; however, secured party was not entitled to apply proceeds of sale, first to balances due on two security agreements which were not guaranteed, totally satisfying those obligations, and then to balances due on guaranteed security agreements leaving deficiency on them, but was required under UCC § 9-504(1)(b) to apply proceeds of disposition to satisfaction of indebtedness secured by security interest under which disposition was made. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974).

13. Deficiency judgment as affected by non-compliance.

In action by bank to recover deficiency judgment on promissory notes secured by lien on personal property, defendants were not prohibited by terms of Uniform Commercial Code from raising issue, by way of defense or partial defense, that collateral was not sold in commercially reasonable manner. *Christian v. First*

Nat'l Bank, 531 S.W.2d 832 (Tex. Civ. App. 1975), writ ref'd n.r.e., (Apr. 21, 1976).

Creditor's failure to give notice to debtor of sale of repossessed collateral does not necessarily result in forfeiture of creditor's right to deficiency. *Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (1972), review denied, 81 Wash. 2d 1001 (1972).

14. —Non-compliance as bar.

Where secured party failed to give required notice of sale of collateral and failed to conduct sale in commercially reasonable manner, this failure barred deficiency judgment where the failure was raised as affirmative defense. *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 59 A.L.R.3d 389 (3d Dist. 1972).

15. —Setoff of debtor's damages.

Where (1) creditor, after debtor's default in making payments on two trucks, sent debtor notice in April, 1975 that trucks would be sold at private sale after time specified in May, 1975, (2) trucks were sold at time specified in such notice, but sale was public and not private, (3) creditor purchased trucks at such sale for amount equal to expenses of conducting sale, and (4) creditor, nine months later, sold trucks at private sale and sued debtor for deficiency judgment for unpaid balance due on trucks, court held (1) that first sale of trucks, which was public sale, was invalid under UCC § 9-504(3) because notice thereof did not specify time and place of sale, (2) second sale of trucks nine months later at private sale was valid because notice thereof, which had been sent to debtor in April, 1975, constituted reasonable notification under UCC § 9-504(3), provided that test of commercial reasonableness of such sale could be met, and (3) even if at trial of case it should be found that creditor had not conducted sale in commercially reasonable manner, creditor was not thereby deprived of right to deficiency judgment, since debtor under UCC § 9-507(1) could offset any loss sustained as result of creditor's failure to conduct sale in commercially reasonable manner against any deficiency judgment that creditor might obtain. *Associates Fin. Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978).

Although strict compliance with the written notice provisions of UCC § 9-505(2) may not be essential where the debtor is claiming that the secured party has retained the collateral to satisfy the obligation, the creditor should in some way manifest an intent to accept the collateral in full satisfaction of such obligation. The better interpretation of UCC § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain the collateral in satisfaction of the debt in certain specified situations where he manifests that intent. A debtor who has been damaged by improper retention of collateral has a remedy in UCC § 9-507(1), which allows him to recover from the secured party a loss caused by a failure to comply with any of the default provisions of Part 5 of UCC Article 9. If the loss experienced by the debtor equals the amount due under the obligation, the secured party, of course, will be entitled to no recovery. The debtor is sufficiently protected by UCC § 9-507(1) without employing a strained reading of UCC § 9-505(2) to imply retention of collateral in satisfaction of the debt where no such result was intended by the secured party. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Secured party's failure to give debtor notice of time and place of sale of collateral, as required by UCC § 9-504(3), will not release debtor from any deficiency that may exist after the sale. In such case, however, debtor under UCC § 9-507(1) may receive credit or recover damages for any loss that he sustained as result of such failure to notify. *Zions First Nat'l Bank v. Hurst*, 570 P.2d 1031 (Utah 1977).

Creditor may obtain deficiency judgment despite failure to comply fully with requirement of Code § 9-504(3), and in such instances debtor's relief is limited to rights set forth in Code § 9-507(1). *Lincoln Rochester Trust Co. v. Howard*, 75 Misc. 2d 181 (1973).

Where finance company failed to give notice of sale of repossessed automobile as required by § 9-504(3), suit for a deficiency judgment against debtor was remanded for determination of the amount due the company, if any, after allowing the

debtor the off sets provided by this section. *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

16. —Evidence and burden of proof.

Secured creditor who has liquidated his security may maintain action for deficiency judgment, but such secured creditor has burden to prove that due notice of sale as provided by law was given to debtor and that sale was commercially reasonable. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

Notwithstanding secured party's failure to notify debtor, as required by UCC § 9-504(3), of sale of collateral after debtor's default, secured party still has right to bring action for deficiency judgment, since debtor under UCC § 9-507(1) has right of action against secured party for latter's failure to proceed properly with sale of collateral. However, if secured party sells collateral without giving debtor notice required by UCC § 9-504(3), he must then prove, in his action for deficiency judgment, that reasonable value of collateral at time of sale was less than amount of debt owed by debtor. *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918, 7 A.L.R.4th 285 (1977).

In action by secured party to establish deficiency judgment against debtors, after default and public sale of collateral securing indebtedness, secured party was not barred from recovering deficiency by its failure to comply with notice provisions of UCC § 9-504(3), particularly where transaction was commercial dealing between experienced businessmen, and secured party's failure to give notice created, at most, rebuttable presumption that value of collateral equaled amount of debt, thus placing on secured party burden of proving that fair market value of goods sold was less than this amount. Evidence that sale was advertised and attracted numerous bidders, which permitted jury to find that sale was "commercially reasonable" and to infer that total amount received at sale was evidentiary of fair value of goods, combined with other evidence of their minimum fair value, was sufficient to support conclusion that secured party met its burden of proving by preponderance of evidence that fair value

of goods at time and place of sale did not exceed net amount received from sale. *United States v. Whitehouse Plastics*, 501 F.2d 692 (5th Cir. Tex. 1974), cert. denied, 421 U.S. 912, 95 S. Ct. 1566, 43 L. Ed. 2d 777 (1975).

17. Commercial reasonableness.

Where, under franchising agreement between manufacturer of industrial equipment and manufacturer's franchisee, reserve account was created to aid franchisee in financing sales to customers, court held (1) that if no fiduciary relationship existed between parties, manufacturer was required to handle funds in reserve account in "commercially reasonable manner" required by UCC § 9-502(2); (2) that if fiduciary relationship did exist between parties and if other factors necessary to create constructive trust were present, manufacturer, as trustee of such trust, was required to handle trust (reserve-account funds) in "prudent and proper manner"; (3) that if manufacturer was not trustee and "commercially reasonable manner" standard applied to case, under UCC § 9-507(2), element of price-with regard to sales of repossessed equipment involved in suit—was one factor in determining commercial reasonableness of such sales, although it was not determinative factor; and (4) that whether franchisee had given manufacturer notice of defects in equipment supplied by manufacturer, as required by UCC § 2-607(3)(a), was jury question. *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386 (5th Cir. 1982).

Although UCC § 9-507(2) provides that the fact that a better price could have been obtained at a different time or in a different method from that selected by the secured party is not, by itself, sufficient to establish that the sale was not made in a commercially reasonable manner, price is nevertheless a "term" of sale under UCC § 9-504(3). *Associates Capital Servs. Corp. v. Riccardi*, 454 F. Supp. 832 (D.R.I. 1978).

UCC § 9-507(1) provides that a secured party who proposes to dispose of collateral in an unreasonable manner may be restrained from doing so by court order. The statute also provides for damages where an unreasonable disposition has been ef-

fected and, in the case of an unreasonable disposition of consumer goods, prescribes a minimum recovery. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), rev'd, 587 S.W.2d 668 (Tex. 1979).

UCC § 9-507(2) does not make every inadequacy in price, however slight, commercially unreasonable. However, a truly gross inadequacy in price, if established by the evidence and believed by the jury, will support a finding that the sale was not "in conformity with reasonable commercial practices among dealers" in the type of property sold. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Although UCC § 9-507(2) states that fact that higher price could have been obtained by secured party's sale of collateral, after debtor's default, at different time or by different method from that actually employed is not in itself sufficient to establish that such sale was not made in commercially reasonable manner, nevertheless, a substantial discrepancy between sale price and reasonable value of such property, when viewed in light of all circumstances surrounding sale, is relevant to determination of whether sale was commercially reasonable, particularly where secured party itself purchased property. *Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank Constr. Co.-Alaska*, 568 P.2d 1007 (Alaska 1977).

UCC § 9-504 regulating sale of repossessed collateral does not require public sale on notice, but only that sale be "commercially reasonable"; even if secured party failed to comply with provisions of UCC § 9-504(3), debtor would not be discharged from all liability under contract, but would rather be entitled under UCC § 9-507(1) to recover for damages caused thereby. *Stanchi v. Kemp*, 48 A.D.2d 973 (3d Dep't 1975).

Under UCC, adequacy or insufficiency of price for which collateral is sold at private sale after default and repossession is one of "terms" of sale, and is relevant along with other issues, in determining whether sale was commercially reasonable. *Associates Fin. Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973).

Under UCC §§ 9-504(3) and 9-507(2), the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. *First Nat'l Bank v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

Although a debtor is entitled to recoup any "loss" caused by failure of the secured party to comply with the UCC, the mere fact that a better price could have been obtained by sale at a different time, or different place or manner is not of itself sufficient to establish that the sale was not commercially reasonable. *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196 (Ky. 1964).

Where after repossession, a finance company sold an automobile for less than one-half of one recognized criterion of market price, there were equitable grounds for giving debtors right to prove that the sale was not made in a commercially reasonable manner. *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (1961).

18. —Particular dispositions reasonable.

Secured creditor's foreclosure sale was conducted in commercially reasonable manner, even though subsequent sale of collateral purchased by secured creditor at foreclosure sale enabled secured creditor to receive an amount over and above price paid at foreclosure sale. In *re Whatley*, 126 B.R. 231 (Bankr. N.D. Miss. 1991).

In action against guarantor to recover balance due on loan, where guarantor, instead of making good on its guaranty, advised creditor to dispose of collateral over extended period of time through liquidator specially recommended by guarantor, but creditor sold collateral at public auction and net proceeds of sale were insufficient to pay off balance due on loan, guarantor could not successfully contend that because of creditor's failure to follow guarantor's recommendation for disposing of collateral, collateral was thereby unjustifiably impaired so as to discharge guarantor under UCC § 3-606(1)(b), since guarantor had waived its right to claim such discharge by consenting in its guar-

anty to auction sale as appropriate method for disposal of collateral. Moreover, such consent was not vitiated by creditor's alleged failure to meet its obligation under UCC § 9-504(3) to dispose of collateral in commercially reasonable manner — which obligation assertedly was not met because of creditor's failure to follow guarantor's recommendation which purportedly would have resulted in a higher price for the collateral — since UCC § 9-507(2) expressly states that fact that different method of disposition would have produced a better price does not of itself establish that sale was not made in a commercially reasonable manner. In addition, UCC § 9-507(2) also states that disposition of collateral that has been approved in any judicial proceeding shall conclusively be deemed to be commercially reasonable, and in present case sale of collateral had been approved by court in debtor's receivership proceedings, and guarantor had not attempted to restrain such sale after creditor had committed itself to an auction sale. *Rhode Island Hosp. Trust Nat'l Bank v. National Health Found.*, 119 R.I. 823, 384 A.2d 301 (1978).

The sale of repossessed logging equipment at public auction was reasonable despite contentions that better price could have been received elsewhere and that better price could have been received if machine were disassembled and sold for parts; receipt of notice of sale by debtor was not required under UCC, only requirement being reasonable attempt of reposessor to notify, and debtor could not rely upon misstatement of place of sale in notice of sale where debtor claimed he never received notice. *James Talcott, Inc. v. Reynolds*, 165 Mont. 404, 529 P.2d 352 (1974).

Sale of property of bankrupt cosmetic manufacturer for purpose of liquidation was commercially reasonable where it was adequately advertised, conducted by experienced auctioneer, and 14 people registered their presence at the auction, despite fact that it resulted in \$3,000 bid for property having a much higher cost value. In *re Zsa Zsa, Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. N.Y. 1973).

Primary focus of commercial reasonableness is not proceeds received from

sale but rather procedures employed for sale; and sale intended to liquidate bankrupt cosmetic manufacturer's secured debt, which had been well advertised and was conducted by auctioneer with approximately 25 years experience, at which fourteen people registered their presence, which involved use of both bulk and lot building, and which brought bid of \$300,000 for collateral that included inventory given estimated retail value of \$3.5 million, wholesale value of \$1.5 million, and cost value of \$500,000, had benefit of judicial guidance and was valid. In *re Zsa Zsa, Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. N.Y. 1973).

Where bank which had advertised proposed sale of stock held as collateral and requested sealed bids therefor contracted with investment company for sale of stock prior to opening sealed bids, bank's action in rejecting plaintiff's bid, which was higher than contract price, was commercially reasonable in view of fact that plaintiff had previously indicated that \$40 per share would be his top price and bank saw contract as only concrete opportunity for it to get \$46 per share at time when market price of stock was \$34 to \$35 per share. *Fenstermacher v. Philadelphia Nat'l Bank*, 351 F. Supp. 1015 (E.D. Pa. 1972), *aff'd*, 493 F.2d 333 (3d Cir. Pa. 1974).

Sale of cattle and related farm equipment at recognized public auction in area where possession was obtained and where year-round cattle market existed was "commercially reasonable", it being expected that at such a sale the price obtained may not be as high as the price would be if a farmer were selling his own property. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

Where year-round market existed for property sold, sale at recognized public auction, with advance advertising, was "commercially reasonable", even though sale price was not as high as price would be if farmer was selling his own property. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. Neb. 1973).

Code requirement that secured party act "in good faith and in commercially

reasonable manner" did not require pledgee of shares of stock, acting in good faith, to exercise reasonable care to obtain best price for shares sold, provided he sold at price current in recognized market for sale of such shares; and pledgee therefore was authorized to refuse in good faith to consent to sell at time or upon terms designated by pledgor. *Hutchison v. Southern Cal. First Nat'l Bank*, 27 Cal. App. 3d 572, 68 A.L.R.3d 645 (4th Dist. 1972).

By approval of transfer of stock and by entry of summary judgment in receivership proceeding, trial court determined that disposition of stock was commercially reasonable as matter of law. *Frontier Inv. Corp. v. Belleville Nat'l Sav. Bank*, 119 Ill. App. 2d 2, 254 N.E.2d 295 (5th Dist. 1969).

19. —Particular dispositions not reasonable.

UCC § 9-507(1) provides that a secured party who proposes to dispose of collateral in an unreasonable manner may be restrained from doing so by court order. The statute also provides for damages where an unreasonable disposition has been effected and, in the case of an unreasonable disposition of consumer goods, prescribes a minimum recovery. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), *rev'd*, 587 S.W.2d 668 (Tex. 1979).

UCC § 9-507(1) does not entitle a debtor, simply because the collateral is consumer goods, to at least a minimum recovery where the creditor gives notice of a proposed disposition of collateral that is commercially unreasonable but then fails to dispose of it. The statute is not intended to punish a creditor and recompense a debtor unless the debtor has been injured. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), *rev'd*, 587 S.W.2d 668 (Tex. 1979).

In action by federal Small Business Administration for deficiency judgment on note following sale of collateral which was security for note, allowance of debtor's counterclaim for damages under UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) by selling collateral

in commercially unreasonable manner would be sustained where evidence sufficiently showed, among other things, that sale had been inadequately advertised and that collateral had been sold for \$20,000, even though creditor had assessed its value at nearly \$90,000 six months before the sale. In such case, moreover, since remedy provided in UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) precluded debtor from setting up bar to deficiency judgment for creditor, deficiency judgment obtained by creditor would also be sustained. *Barbour v. United States*, 562 F.2d 19 (10th Cir. Kan. 1977).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer's intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting "commercially reasonable" disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their prior course of dealing and their conduct in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient

to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

Where no notice of time, date, place and manner of sale was ever given to debtor by secured party as is normally required under UCC § 9-504(1) and (3), secured party was not entitled to deficiency judgment or attorney's fees and debtor was entitled to damages pursuant to UCC § 9-507. *Chrysler Credit Corp. v. Burns*, 562 P.2d 233 (Utah 1977).

Where owner of automobile, which was repossessed after default on installment contract, did not receive notice of place of public sale and where, although automobile was in good condition, proceeds obtained less than six months after initial purchase were only about 55% of the amount originally financed, creditor could not recover deficiency judgment in absence of showing that the method, manner, time, place and terms of sale were in fact commercially reasonable. *Marine Midland Bank-Central v. Watkins*, 89 Misc. 2d 949 (1977).

Creditor's default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor's failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

It was necessary for seller of automobile to establish that every aspect of sale of automobile after buyer's default was commercially reasonable, including adequacy of price for which automobile was sold; and private sale by seller which took place by means of inter-office exchange of papers with automobile sold back into seller's inventory at appraised "wholesale" value was as matter of law commercially unreasonable. *Vic Hansen & Sons v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728, 59 A.L.R.3d 360 (1973).

Plaintiff did not sell aircraft in commercially reasonable manner, where he did not advertise or otherwise make reasonable contacts within the industry to dispose of the aircraft, but rather took the quick and easy way out by selling the aircraft to the same people who had been using it. *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659 (W.D. Okla. 1972).

20. —Judicially-approved dispositions.

Where several debtors pledged shares of stock as collateral for loan and, after loan was in default, one debtor filed petition for bankruptcy, where bankruptcy court approved sale of bankrupt debtor's shares subject to condition that entire block of shares, including those pledged by other debtors, would be sold as unit, and where secured party thereupon conducted sale and sold entire block, sale was judicially-approved disposition and was entitled to conclusive presumption of reasonableness under UCC § 9-507(2) even though court did not have jurisdiction over other debtors' collateral since other debtors actively participated in proceedings leading to approval of sale of bankrupt's shares in conjunction with sale of entire unit and since they had requisite opportunity to object to terms of sale. *Bryant v. American Nat'l Bank & Trust Co.*, 407 F. Supp. 360 (N.D. Ill. 1976).

21. —Evidence and burden of proof.

In action brought by secured creditor against maker and guarantor of note to recover deficiency alleged to be due on note after secured creditor sold collateral, summary judgment in favor of secured creditor was precluded by existence of

factual issues concerning propriety of notice of sale and whether sale was conducted in commercially reasonable manner. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

In action for deficiency judgment following repossession and sale of mobile home, wherein defense was lack of notice as to sale and commercial unreasonableness of sale and defendant counterclaimed for assessment of penalty against plaintiff for noncompliance with Uniform Commercial Code, court erred in striking defendant's interrogatories seeking information concerning sale and inquiring into existence of any relationship that might give reason to question propriety of sale and its commercial reasonableness, but court did not abuse its discretion in striking interrogatories seeking information either irrelevant or previously requested in other interrogatories. *Lincoln First Bank v. Rhoades*, 59 A.D.2d 1046 (4th Dep't 1977).

In action by creditor to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that testimony showed that price paid by buyer at creditor's sale of collateral was inadequate and thus raised issue of fact as to whether sale was made in commercially reasonable manner could not be sustained under UCC § 9-507(2) where guarantors offered no testimony that sale was commercially unreasonable for any other reason. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

It was necessary for seller of automobile to establish that every aspect of sale of automobile after buyer's default was commercially reasonable, including adequacy of price for which automobile was sold. *Vic Hansen & Sons v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728, 59 A.L.R.3d 360 (1973).

Evidence of inadequacy of price for which collateral is sold at private sale after default and repossession is relevant in determining whether sale was commercially reasonable, and was admissible under a general denial in an action to recover a deficiency judgment for the balance due on a secured note after a sale of the collateral security. *First Nat'l Bank v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

Although Code does not compel sale of secured aircraft at highest possible price, sale must be conducted in commercially reasonable manner; where, prior to repossession, buyer had substantially improved aircraft which he had originally purchased for \$100,000, resale less than one

year after original purchase for \$31,000, raised genuine issue of material fact relating to commercial reasonableness of sale precluding disposition by summary judgment. *California Airmotive Corp. v. Jones*, 24 Ohio Misc. 255, 415 F.2d 554 (6th Cir. Ohio 1969).

RESEARCH REFERENCES

ALR. Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage. 46 A.L.R.2d 992.

Effect of default by conditional seller in the resale of repossessed property. 49 A.L.R.2d 77.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

UCC: value of trade-in taken on sale of collateral for purposes of computing sur-

plus or deficiency. 72 A.L.R.4th 1128.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 737 et seq.

Rights and remedies of debtor; recovery from secured party for noncompliance, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:811-9:821.

4 Am. Jur. Proof of Facts 2d, Secured Party's Failure to Sell Collateral in Commercially Reasonable Manner, §§ 12 et seq. (proof that secured party's sale of repossessed collateral was not commercially reasonable).

CJS. 79 C.J.S., Secured Transactions § 185.

72 C.J.S., Pledges §§ 53 et seq.

§ 75-9-626. Action in which deficiency or surplus is in issue.

In an action arising from a transaction in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(3) Except as otherwise provided in Section 75-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

(A) The proceeds of the collection, enforcement, disposition, or acceptance; or

(B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under Section 75-9-615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-627. Determination of whether conduct was commercially reasonable.

(a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

(3) By a representative of creditors; or

(4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

SOURCES: Derived from former 1972 Code § 75-9-507 [Codes, 1942, § 41A:9-507; Laws, 1966, ch. 316, § 9-507, eff March 31, 1968] and enacted by Laws, 2001, ch. 495, § 1, eff from and after January 1, 2002.

Cross References — Injunctions, generally, see §§ 11-13-1 et seq.
Obligation of good faith, see § 75-1-203.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-9-507(2).

6. Commercial reasonableness.
7. —Particular dispositions reasonable.
8. —Particular dispositions not reasonable.
9. —Judicially-approved dispositions.
10. —Evidence and burden of proof.

I. Under Current Law.

1.-5. [Reserved for future use.]

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6. Commercial reasonableness.

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UCC § 9-507(2) does not make every inadequacy in price, however slight, commercially unreasonable. However, a truly gross inadequacy in price, if established by the evidence and believed by the jury, will support a finding that the sale was not "in conformity with reasonable commercial practices among dealers" in the type of property sold. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Although UCC § 9-507(2) states that fact that higher price could have been obtained by secured party's sale of collateral, after debtor's default, at different time or by different method from that actually employed is not in itself sufficient to establish that such sale was not made in commercially reasonable manner, nevertheless, a substantial discrepancy between sale price and reasonable value of such property, when viewed in light of all circumstances surrounding sale, is relevant to determination of whether sale was commercially reasonable, particularly where secured party itself purchased property. *Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank Constr. Co.-Alaska*, 568 P.2d 1007 (Alaska 1977).

UCC § 9-504 regulating sale of repossessed collateral does not require public sale on notice, but only that sale be "commercially reasonable"; even if secured party failed to comply with provisions of

UCC § 9-504(3), debtor would not be discharged from all liability under contract, but would rather be entitled under UCC § 9-507(1) to recover for damages caused thereby. *Stanchi v. Kemp*, 48 A.D.2d 973 (3d Dep't 1975).

Under UCC, adequacy or insufficiency of price for which collateral is sold at private sale after default and repossession is one of "terms" of sale, and is relevant along with other issues, in determining whether sale was commercially reasonable. *Associates Fin. Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973).

Under UCC §§ 9-504(3) and 9-507(2), the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. *First Nat'l Bank v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

Although a debtor is entitled to recoup any "loss" caused by failure of the secured party to comply with the UCC, the mere fact that a better price could have been obtained by sale at a different time, or different place or manner is not of itself sufficient to establish that the sale was not commercially reasonable. *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196 (Ky. 1964).

Where after repossession, a finance company sold an automobile for less than one-half of one recognized criterion of market price, there were equitable grounds for giving debtors right to prove that the sale was not made in a commercially reasonable manner. *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (1961).

7. —Particular dispositions reasonable.

Secured creditor's foreclosure sale was conducted in commercially reasonable manner, even though subsequent sale of collateral purchased by secured creditor at foreclosure sale enabled secured creditor to receive an amount over and above price paid at foreclosure sale. In *re Whatley*, 126 B.R. 231 (Bankr. N.D. Miss. 1991).

In action against guarantor to recover balance due on loan, where guarantor, instead of making good on its guaranty,

advised creditor to dispose of collateral over extended period of time through liquidator specially recommended by guarantor, but creditor sold collateral at public auction and net proceeds of sale were insufficient to pay off balance due on loan, guarantor could not successfully contend that because of creditor's failure to follow guarantor's recommendation for disposing of collateral, collateral was thereby unjustifiably impaired so as to discharge guarantor under UCC § 3-606(1)(b), since guarantor had waived its right to claim such discharge by consenting in its guaranty to auction sale as appropriate method for disposal of collateral. Moreover, such consent was not vitiated by creditor's alleged failure to meet its obligation under UCC § 9-504(3) to dispose of collateral in commercially reasonable manner — which obligation assertedly was not met because of creditor's failure to follow guarantor's recommendation which purportedly would have resulted in a higher price for the collateral — since UCC § 9-507(2) expressly states that fact that different method of disposition would have produced a better price does not of itself establish that sale was not made in a commercially reasonable manner. In addition, UCC § 9-507(2) also states that disposition of collateral that has been approved in any judicial proceeding shall conclusively be deemed to be commercially reasonable, and in present case sale of collateral had been approved by court in debtor's receivership proceedings, and guarantor had not attempted to restrain such sale after creditor had committed itself to an auction sale. *Rhode Island Hosp. Trust Nat'l Bank v. National Health Found.*, 119 R.I. 823, 384 A.2d 301 (1978).

The sale of repossessed logging equipment at public auction was reasonable despite contentions that better price could have been received elsewhere and that better price could have been received if machine were disassembled and sold for parts; receipt of notice of sale by debtor was not required under UCC, only requirement being reasonable attempt of reposessor to notify, and debtor could not rely upon misstatement of place of sale in notice of sale where debtor claimed he never received notice. *James Talcott, Inc.*

v. Reynolds, 165 Mont. 404, 529 P.2d 352 (1974).

Sale of property of bankrupt cosmetic manufacturer for purpose of liquidation was commercially reasonable where it was adequately advertised, conducted by experienced auctioneer, and 14 people registered their presence at the auction, despite fact that it resulted in \$3,000 bid for property having a much higher cost value. In re Zsa Zsa, Ltd., 352 F. Supp. 665 (S.D.N.Y. 1972), aff'd, 475 F.2d 1393 (2d Cir. N.Y. 1973).

Primary focus of commercial reasonableness is not proceeds received from sale but rather procedures employed for sale; and sale intended to liquidate bankrupt cosmetic manufacturer's secured debt, which had been well advertised and was conducted by auctioneer with approximately 25 years experience, at which fourteen people registered their presence, which involved use of both bulk and lot building, and which brought bid of \$300,000 for collateral that included inventory given estimated retail value of \$3.5 million, wholesale value of \$1.5 million, and cost value of \$500,000, had benefit of judicial guidance and was valid. In re Zsa Zsa, Ltd., 352 F. Supp. 665 (S.D.N.Y. 1972), aff'd, 475 F.2d 1393 (2d Cir. N.Y. 1973).

Where bank which had advertised proposed sale of stock held as collateral and requested sealed bids therefor contracted with investment company for sale of stock prior to opening sealed bids, bank's action in rejecting plaintiff's bid, which was higher than contract price, was commercially reasonable in view of fact that plaintiff had previously indicated that \$40 per share would be his top price and bank saw contract as only concrete opportunity for it to get \$46 per share at time when market price of stock was \$34 to \$35 per share. Fenstermacher v. Philadelphia Nat'l Bank, 351 F. Supp. 1015 (E.D. Pa. 1972), aff'd, 493 F.2d 333 (3d Cir. Pa. 1974).

Sale of cattle and related farm equipment at recognized public auction in area where possession was obtained and where year-round cattle market existed was "commercially reasonable", it being expected that at such a sale the price obtained may not be as high as the price

would be if a farmer were selling his own property. United States v. Pirnie, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

Where year-round market existed for property sold, sale at recognized public auction, with advance advertising, was "commercially reasonable", even though sale price was not as high as price would be if farmer was selling his own property. United States v. Pirnie, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

Code requirement that secured party act "in good faith and in commercially reasonable manner" did not require pledgee of shares of stock, acting in good faith, to exercise reasonable care to obtain best price for shares sold, provided he sold at price current in recognized market for sale of such shares; and pledgee therefore was authorized to refuse in good faith to consent to sell at time or upon terms designated by pledgor. Hutchison v. Southern Cal. First Nat'l Bank, 27 Cal. App. 3d 572, 68 A.L.R.3d 645 (4th Dist. 1972).

By approval of transfer of stock and by entry of summary judgment in receivership proceeding, trial court determined that disposition of stock was commercially reasonable as matter of law. Frontier Inv. Corp. v. Belleville Nat'l Sav. Bank, 119 Ill. App. 2d 2, 254 N.E.2d 295 (5th Dist. 1969).

8. —Particular dispositions not reasonable.

UCC § 9-507(1) provides that a secured party who proposes to dispose of collateral in an unreasonable manner may be restrained from doing so by court order. The statute also provides for damages where an unreasonable disposition has been effected and, in the case of an unreasonable disposition of consumer goods, prescribes a minimum recovery. Gray-Taylor, Inc. v. Tennessee, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), rev'd, 587 S.W.2d 668 (Tex. 1979).

UCC § 9-507(1) does not entitle a debtor, simply because the collateral is consumer goods, to at least a minimum recovery where the creditor gives notice of a proposed disposition of collateral that is

commercially unreasonable but then fails to dispose of it. The statute is not intended to punish a creditor and recompense a debtor unless the debtor has been injured. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859 (Tex. Civ. App. 1978), writ granted, 22 Tex. Sup. Ct. J. 380 (Tex. 1979), rev'd, 587 S.W.2d 668 (Tex. 1979).

In action by federal Small Business Administration for deficiency judgment on note following sale of collateral which was security for note, allowance of debtor's counterclaim for damages under UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) by selling collateral in commercially unreasonable manner would be sustained where evidence sufficiently showed, among other things, that sale had been inadequately advertised and that collateral had been sold for \$20,000, even though creditor had assessed its value at nearly \$90,000 six months before the sale. In such case, moreover, since remedy provided in UCC § 9-507(1) for creditor's noncompliance with UCC § 9-504(3) precluded debtor from setting up bar to deficiency judgment for creditor, deficiency judgment obtained by creditor would also be sustained. *Barbour v. United States*, 562 F.2d 19 (10th Cir. Kan. 1977).

In action by buyer for damages for wrongful sale of repossessed automobile against dealer who resold vehicle and bank which had security interest therein, where buyer requested bank employee, while employee was repossessing vehicle on June 9, 1975, to hold vehicle for ten days to allow buyer to redeem it, and employee agreed to such request and orally informed dealer of buyer's intention to redeem; where bank on June 9, 1975, notified buyer by letter that efforts to resell vehicle would commence on June 19, 1975, and would continue until it was resold; where such letter also notified buyer of his right to redeem vehicle before its resale, but did not indicate where resale would take place; and where buyer received such letter on June 14, 1975, which was date on which dealer resold vehicle to third person, (1) bank as secured party at time of default, repossession, and resale violated its duty under UCC § 9-504(3) to give buyer reasonable

notice of time and place of such resale and thus could have been found by jury to be liable under UCC § 9-507(1) for not effecting "commercially reasonable" disposition of vehicle under UCC § 9-504(3); (2) bank also could have been found liable for violation of UCC § 9-506 for not permitting buyer to redeem vehicle; and (3) jury could further have found that connection existed between bank and dealer in their prior course of dealing and their conduct in present transaction which demonstrated community of action and interest that would render both liable to buyer, particularly in view of evidence sufficient to show that bank had adopted dealer's actions by accepting dealer's check, based on proceeds of resale, for full payment of balance owed by buyer on vehicle. *Wells v. Central Bank*, 347 So. 2d 114 (Ala. Civ. App. 1977).

Where no notice of time, date, place and manner of sale was ever given to debtor by secured party as is normally required under UCC § 9-504(1) and (3), secured party was not entitled to deficiency judgment or attorney's fees and debtor was entitled to damages pursuant to UCC § 9-507. *Chrysler Credit Corp. v. Burns*, 562 P.2d 233 (Utah 1977).

Where owner of automobile, which was repossessed after default on installment contract, did not receive notice of place of public sale and where, although automobile was in good condition, proceeds obtained less than six months after initial purchase were only about 55% of the amount originally financed, creditor could not recover deficiency judgment in absence of showing that the method, manner, time, place and terms of sale were in fact commercially reasonable. *Marine Midland Bank-Central v. Watkins*, 89 Misc. 2d 949 (1977).

Creditor's default sale of tractor was not commercially reasonable as required by UCC § 9-504(3) where debtors had no notice other than posting of notice of sale at courthouse and where there was no evidence that tractor was sold in any recognized market for used tractors, that it was sold at price current on any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers; however, creditor

was not absolutely barred from recovering deficiency judgment against debtor in any amount; rather debt was to be credited with amount that reasonably should have been obtained through sale conducted in reasonably commercial manner according to UCC and creditor's failure to dispose of collateral as required by Code raised presumption that collateral was worth at least amount of debt, which placed upon creditor burden of overcoming such presumption by proving market value of collateral by evidence other than resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

It was necessary for seller of automobile to establish that every aspect of sale of automobile after buyer's default was commercially reasonable, including adequacy of price for which automobile was sold; and private sale by seller which took place by means of inter-office exchange of papers with automobile sold back into seller's inventory at appraised "wholesale" value was as matter of law commercially unreasonable. *Vic Hansen & Sons v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728, 59 A.L.R.3d 360 (1973).

Plaintiff did not sell aircraft in commercially reasonable manner, where he did not advertise or otherwise make reasonable contacts within the industry to dispose of the aircraft, but rather took the quick and easy way out by selling the aircraft to the same people who had been using it. *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659 (W.D. Okla. 1972).

9. —Judicially-approved dispositions.

Where several debtors pledged shares of stock as collateral for loan and, after loan was in default, one debtor filed petition for bankruptcy, where bankruptcy court approved sale of bankrupt debtor's shares subject to condition that entire block of shares, including those pledged by other debtors, would be sold as unit, and where secured party thereupon conducted sale and sold entire block, sale was judicially-approved disposition and was entitled to conclusive presumption of reasonableness under UCC § 9-507(2) even though court did not have jurisdiction over other debtors' collateral since other debtors actively participated in proceedings leading to ap-

proval of sale of bankrupt's shares in conjunction with sale of entire unit and since they had requisite opportunity to object to terms of sale. *Bryant v. American Nat'l Bank & Trust Co.*, 407 F. Supp. 360 (N.D. Ill. 1976).

10. —Evidence and burden of proof.

In action brought by secured creditor against maker and guarantor of note to recover deficiency alleged to be due on note after secured creditor sold collateral, summary judgment in favor of secured creditor was precluded by existence of factual issues concerning propriety of notice of sale and whether sale was conducted in commercially reasonable manner. *Security Trust Co. v. Thomas*, 59 A.D.2d 242 (4th Dep't 1977).

In action for deficiency judgment following repossession and sale of mobile home, wherein defense was lack of notice as to sale and commercial unreasonableness of sale and defendant counterclaimed for assessment of penalty against plaintiff for noncompliance with Uniform Commercial Code, court erred in striking defendant's interrogatories seeking information concerning sale and inquiring into existence of any relationship that might give reason to question propriety of sale and its commercial reasonableness, but court did not abuse its discretion in striking interrogatories seeking information either irrelevant or previously requested in other interrogatories. *Lincoln First Bank v. Rhoades*, 59 A.D.2d 1046 (4th Dep't 1977).

In action by creditor to collect on promissory note, to enforce agreement securing it, and to enforce agreement guaranteeing payment of note, contention of guarantors that testimony showed that price paid by buyer at creditor's sale of collateral was inadequate and thus raised issue of fact as to whether sale was made in commercially reasonable manner could not be sustained under UCC § 9-507(2) where guarantors offered no testimony that sale was commercially unreasonable for any other reason. *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

It was necessary for seller of automobile to establish that every aspect of sale of automobile after buyer's default was commercially reasonable, including adequacy

of price for which automobile was sold. *Vic Hansen & Sons v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728, 59 A.L.R.3d 360 (1973).

Evidence of inadequacy of price for which collateral is sold at private sale after default and repossession is relevant in determining whether sale was commercially reasonable, and was admissible under a general denial in an action to recover a deficiency judgment for the balance due on a secured note after a sale of the collateral security. *First Nat'l Bank v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

Although Code does not compel sale of secured aircraft at highest possible price, sale must be conducted in commercially reasonable manner; where, prior to repossession, buyer had substantially improved aircraft which he had originally purchased for \$100,000, resale less than one year after original purchase for \$31,000, raised genuine issue of material fact relating to commercial reasonableness of sale precluding disposition by summary judgment. *California Airmotive Corp. v. Jones*, 24 Ohio Misc. 255, 415 F.2d 554 (6th Cir. Ohio 1969).

RESEARCH REFERENCES

ALR. Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after the damage. 46 A.L.R.2d 992.

Effect of default by conditional seller in the resale of repossessed property. 49 A.L.R.2d 77.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Uniform Commercial Code: Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

UCC: value of trade-in taken on sale of collateral for purposes of computing sur-

plus or deficiency. 72 A.L.R.4th 1128.

Am Jur. 68A Am. Jur. 2d, Secured Transactions §§ 737 et seq.

Rights and remedies of debtor; recovery from secured party for noncompliance, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Forms 9:811-9:821.

4 Am. Jur. Proof of Facts 2d, Secured Party's Failure to Sell Collateral in Commercially Reasonable Manner, §§ 12 et seq. (proof that secured party's sale of repossessed collateral was not commercially reasonable).

CJS. 79 C.J.S., Secured Transactions § 185.

72 C.J.S., Pledges §§ 53 et seq.

§ 75-9-628. Nonliability and limitation on liability of secured party; liability of secondary obligor.

(a) Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article; and

(2) The secured party's failure to comply with this article does not affect the liability of the person for a deficiency.

(b) A secured party is not liable because of its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(c) A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) A debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) An obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) A secured party is not liable to any person under Section 75-9-625(c)(2) for its failure to comply with Section 75-9-616.

(e) A secured party is not liable under Section 75-9-625(c)(2) more than once with respect to any one (1) secured obligation.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

PART 7.

TRANSITION.

SEC.

75-9-701. Definitions.

75-9-702. Savings clause.

75-9-703. Security interest perfected before effective date.

75-9-704. Security interest unperfected before effective date.

75-9-705. Effectiveness of action taken before effective date.

75-9-706. When initial financing statement suffices to continue effectiveness of financing statement.

75-9-707. Amendment of pre-effective-date financing statement.

75-9-708. Persons entitled to file initial financing statement or continuation statement.

75-9-709. Priority.

75-9-710. Special transitional provisions for maintaining and searching local records.

Editor's Note — Many of the notes found under this section originated with the prior version of Chapter 9 which was revised in 2001. They have been moved to their current location at the direction of Codification Counsel. Some of the sections of the Uniform Commercial Code referenced in case notes under 'Judicial Decisions' were current when the cases were decided but may have been revised or repealed since then. Cases decided under former law are clearly identified.

§ 75-9-701. Definitions.

(1) References in Part 7 to "this act" refer to the legislative enactment by which this part is added to Article 9 of the Uniform Commercial Code.

(2) References in this part to “former Article 9” are to Article 9 found in Chapter 9 of Title 75 as in effect on December 31, 2001.

SOURCES: Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 1, eff from and after Jan. 1, 2002.

Amendment Notes — The 2002 amendment substituted “December 31, 2001” for “June 30, 2001” in (2).

§ 75-9-702. Savings clause.

(a) Except as otherwise provided in this part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before January 1, 2002.

(b) Except as otherwise provided in subsection (c) and Sections 75-9-703 through 75-9-709:

(1) Transactions and liens that were not governed by former Article 9, were validly entered into or created before January 1, 2002, and would be subject to this act if they had been entered into or created after this act takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after January 1, 2002; and

(2) The transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this act or by the law that otherwise would apply if this act had not taken effect.

(c) This act does not affect an action, case, or proceeding commenced before January 1, 2002.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-703. Security interest perfected before effective date.

(a) A security interest that is enforceable immediately before January 1, 2002 and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, on January 1, 2002, the applicable requirements for enforceability and perfection under this act are satisfied without further action.

(b) Except as otherwise provided in Section 75-9-705, if, immediately January 1, 2002, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this act are not satisfied on January 1, 2002, the security interest:

(1) Is a perfected security interest for one (1) year after January 1, 2002;

(2) Remains enforceable thereafter only if the security interest becomes enforceable under Section 75-9-203 before the year expires; and

(3) Remains perfected thereafter only if the applicable requirements for perfection under this act are satisfied before the year expires.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-704. Security interest unperfected before effective date.

A security interest that is enforceable immediately before January 1, 2002 but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) Remains an enforceable security interest for one (1) year after January 1, 2002;

(2) Remains enforceable thereafter if the security interest becomes enforceable under Section 75-9-203 on January 1, 2002 or within one (1) year thereafter; and

(3) Becomes perfected:

(A) Without further action, on January 1, 2002 if the applicable requirements for perfection under this act are satisfied before or at that time; or

(B) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-705. Effectiveness of action taken before effective date.

(a) If action, other than the filing of a financing statement, is taken before January 1, 2002 and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before January 1, 2002, the action is effective to perfect a security interest that attaches under this act within one (1) year after January 1, 2002. An attached security interest becomes unperfected one (1) year after January 1, 2002 unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) The filing of a financing statement before this act takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) This act does not render ineffective an effective financing statement that, before January 1, 2002, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former Section 75-9-103. However, except as otherwise provided in subsections (d) and (e) and Section 75-9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) December 31, 2006.

Provided, however, a financing statement filed before January 1, 2002, covering a manufactured home, other than a manufactured home constituting inventory, remains effective, if it so states, until a termination statement is filed.

(d) The filing of a continuation statement after January 1, 2002 does not continue the effectiveness of the financing statement filed before January 1, 2002. However, upon the timely filing of a continuation statement after January 1, 2002 and in accordance with the law of the jurisdiction governing perfection as provided in Part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before January 1, 2002 continues for the period provided by the law of that jurisdiction.

(e) Subsection (c)(2) applies to a financing statement that, before January 1, 2002, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former Section 75-9-103 only to the extent that Part 3 provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) A financing statement that includes a financing statement filed before January 1, 2002 and a continuation statement filed after January 1, 2002 is effective only to the extent that it satisfies the requirements of Part 5 for an initial financing statement.

SOURCES: Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 2, eff from and after Jan. 1, 2002.

Amendment Notes — The 2002 amendment substituted “December 31, 2006” for “June 30, 2006” in (c)(2); and added the undesignated paragraph following (c)(2).

§ 75-9-706. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in Section 75-9-501 continues the effectiveness of a financing statement filed before January 1, 2002 if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this act;

(2) The pre-effective-date financing statement was filed in an office in another state or another office in this state; and

(3) The initial financing statement satisfies subsection (c).

(b) The filing of an initial financing statement under subsection (a) continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before January 1, 2002, for the period provided in former Section 75-9-403 with respect to a financing statement; and

(2) If the initial financing statement is filed after January 1, 2002, for the period provided in Section 75-9-515 with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a), an initial financing statement must:

(1) Satisfy the requirements of Part 5 for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-707. Amendment of pre-effective-date financing statement.

(a) In this section, “pre-effective-date financing statement” means a financing statement filed before January 1, 2002.

(b) After January 1, 2002, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part.

(3) However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d), if the law of this state governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after January 1, 2002 only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in Section 75-9-501;

(2) An amendment is filed in the office specified in Section 75-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies Section 75-9-706(c); or

(3) An initial financing statement that provides the information as amended and satisfies Section 75-9-706(c) is filed in the office specified in Section 75-9-501.

(d) If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under Section 75-9-705(d) and (f) or 75-9-706.

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this state may be terminated after January 1, 2002 by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies Section 75-9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as the office in which to file a financing statement.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

Editor’s Note — The reference in (b) to “provided in Part” should be to “provided in Part 3.” In addition, (b), as enacted, contained a paragraph (3) but not paragraphs (1) or (2).

§ 75-9-708. Persons entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this part if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this part:

(A) To continue the effectiveness of a financing statement filed before January 1, 2002; or

(B) To perfect or continue the perfection of a security interest.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-709. Priority.

(a) This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before January 1, 2002, former Article 9 determines priority.

(b) For purposes of Section 75-9-322(a), the priority of a security interest that becomes enforceable under Section 75-9-203 of this act dates from January 1, 2002 if the security interest is perfected under this act by the filing of a financing statement before January 1, 2002 which would not have been effective to perfect the security interest under former Article 9. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

SOURCES: Laws, 2001, ch. 495, § 1, eff from and after Jan. 1, 2002.

§ 75-9-710. Special transitional provisions for maintaining and searching local records.

(a) In this section:

(1) "Local-filing office" means a filing office, other than the statewide central filing office identified in Section 75-9-401(1) of former Chapter 9, that is designated as the proper place to file a financing statement under Section 75-9-401(1) of former Chapter 9. The term applies only with respect to a record that covers a type of collateral as to which the filing office is designated in that section as the proper place to file.

(2) "Former-Chapter-9 records" means:

(A) Financing statements and other records that have been filed in a local-filing office before January 1, 2002, and that are, or upon processing and indexing will be, reflected in the index maintained, as of December 31, 2001, by the local-filing office for financing statements and other records filed in the local-filing office before January 1, 2002, and

(B) The index as of December 31, 2001.

The term does not include records presented to a local-filing office for filing after December 31, 2001, whether or not the records relate to financing statements filed in the local-filing office before January 1, 2002.

(3) “Mortgage,” “as-extracted collateral,” “fixture filing,” “goods” and “fixtures” have the meanings set forth in Revised Article 9 for those terms.

(b) Except as expressly provided in Part 5 of Chapter 9 as effective on and after January 1, 2002, a local-filing office must not accept for filing a record presented after December 31, 2001, whether or not the record relates to a financing statement filed in the local-filing office before January 1, 2002, other than a termination statement filed in accordance with Section 75-9-707.

(c) Until January 1, 2009, each local-filing office must maintain all former-Chapter-9 records in accordance with former Chapter 9. A former-Chapter-9 record that is not reflected on the index maintained at December 31, 2001, by the local-filing office must be processed and indexed, and reflected on the index as of December 31, 2001, as soon as practicable but in any event no later than January 31, 2002.

(d) Until at least December 31, 2008, each local-filing office must respond to requests for information with respect to former-Chapter-9 records relating to a debtor and issue certificates in accordance with former Chapter 9.

(1) Upon request in writing of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statements naming a particular debtor thereof, and if there is, giving the date and hour of filing and file number of each such financing statement and the name and address of each secured party or his assignee therein. Each such request shall be accompanied by a search fee of Five Dollars (\$5.00) if the request is made on the standard form prescribed by the Secretary of State, and otherwise it shall be Ten Dollars (\$10.00). An additional fee of Two Dollars (\$2.00) shall be paid by the requesting party for each financing statement listed on the filing officer’s certificate, the aggregate of which shall be billed to the requesting party at the time the filing officer’s certificate is issued. Failure to pay the additional fee by any requesting party when due may result in denial of further service to the requesting party until the amount due has been paid.

(2) Upon request, the filing officer shall furnish a copy of any presently effective financing statements on file for a uniform fee of Two Dollars (\$2.00) per page naming a particular debtor when the request is made on the form and in the manner hereinbefore provided for listing the same.

(e) After December 31, 2008, each local-filing office may remove and destroy, in accordance with any then applicable record retention law of this state, all former-Chapter-9 records, including the related index.

(f) This section does not apply, with respect to financing statements and other records, to a filing office in which mortgages or records of mortgages on real property are required to be filed or recorded, if:

- (1) The collateral is timber to be cut or as-extracted collateral, or
- (2) The record is or relates to a financing statement filed as a fixture filing and the collateral is goods that are or are to become fixtures.

SOURCES: Laws, 2001, ch. 495, § 1; Laws, 2002, ch. 453, § 3, eff from and after Jan. 1, 2002.

Amendment Notes — The 2002 amendment rewrote the section.

CHAPTER 10

Uniform Commercial Code—Effective Date and Repealer

SEC.

- | | |
|------------|--|
| 75-10-101. | Effective date. |
| 75-10-102. | Specific repealer; provision for transition. |
| 75-10-103. | General repealer. |
| 75-10-104. | Laws not repealed. |

§ 75-10-101. Effective date.

This code shall become effective on and after March 31, 1968. It applies to transactions entered into and events occurring after that date.

SOURCES: Codes, 1942, § 41A:10-101; Laws, 1966, ch. 316, § 10-101, eff on and after March 31, 1968.

JUDICIAL DECISIONS

1. In general.
2. Pre-code transactions, generally.
3. Refinancing of prior transaction.
4. Breach of pre-code contract.

1. In general.

Date of sale of machine is determinative date for applicability of Code warranty. *Blankenship v. Morrison Mach. Co.*, 255 Md. 241, 257 A.2d 430 (1969), but see, *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 452 A.2d 912 (1982).

Where contract to supply fuel for one of plaintiff's two nuclear power plants, which was entered into before effective date of Florida Uniform Commercial Code, bound plaintiff to buy and defendant to sell such fuel, and also granted plaintiff option to purchase fuel for a second nuclear power plant, and where such option was exercised by plaintiff after effective date of Florida Uniform Commercial Code, court held (1) that under Florida UCC §§ 10-101 and 10-102(2), provisions of Florida Uniform Commercial Code applied only to second fuel contract, which arose when plaintiff exercised option to purchase fuel for second power plant, and did not apply to original contract to furnish fuel for plaintiff's first power plant, since plaintiff's exercise of option to purchase fuel for second power plant was not an "event" within meaning of Florida UCC § 10-101; and (2) that as a result, defendant could not rely on Florida

UCC § 2-615(a) to excuse nonperformance of its obligations under the original fuel contract, but could rely on such statute with respect to nonperformance of its obligations under the second contract. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 579 F.2d 856 (4th Cir. Va. 1978).

Any transfer of plaintiff shareholder's shares, to corporation or otherwise, would be "transaction" entered into and occurring after effective date of Delaware UCC, within meaning of § 10-101, and such transfer would be governed by UCC. *B & H Whse., Inc. v. Atlas Van Lines*, 348 F. Supp. 517 (N.D. Tex. 1972), rev'd on other grounds, 490 F.2d 818 (5th Cir. Tex. 1974).

Uniform Commercial Code was fully applicable to action on note antedating effective date of statute, where transactions and events which precipitated demand for payment and made notes actionable occurred after effective date. *Humble Oil & Ref. Co. v. Copley*, 213 Va. 449, 192 S.E.2d 735 (1972).

UCC provisions dispensing with privity requirement do not apply retroactively. *Kates v. Pepsi Cola Bottling Co.*, 263 A.2d 308 (Del. Super. 1970).

Where corporations wrongfully transferred stock upon forged signatures of the plaintiff trustee, in November of 1962, and notice of the illegal transfers reached the plaintiff trustee in July of 1963, § 8-

405 of the Uniform Commercial Code would not be applied prospectively to bar the plaintiff trustee's cause of actions against the corporations by estopping her from asserting the ineffectiveness of the forged indorsement. *Scovenna v. AT & T Co.*, 54 Misc. 2d 74 (1967).

2. Pre-code transactions, generally.

Promissory note executed prior to effective date of Code was governed by pre-Code law, but second note dated after effective date of Code was separate transaction to which Code did apply. In *re Appliance Packing & Warehousing Corp.*, 358 F. Supp. 84 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1011 (2d Cir. N.Y. 1973).

Chattel Mortgage Act, and not UCC, was applicable to determine right of mortgagee of tractor as against consignee's creditor where chattel mortgage was executed and filed prior to effective date of UCC. *American Nat'l Bank v. Etter*, 28 Colo. App. 511, 476 P.2d 287 (1970).

Holder of valid chattel mortgage under pre-Code law continued to have valid security interest even after passage of UCC. *American Nat'l Bank v. First Nat'l Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970).

Where chattel mortgage with after-acquired property clause was properly recorded before enactment of Code, it was not necessary that there be Code-filing to protect security interest in after-acquired property, where Code had become effective prior to debtor's acquisition of after-acquired property. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969).

Pre-Code security interest may survive interest subsequently acquired by buyer in ordinary course of business. *GECC v. Western Crane & Rigging Co.*, 184 Neb. 212, 166 N.W.2d 409 (1969).

The rights of a plaintiff against a retail seller of masonry nails for breach of an implied warranty of merchantability are governed by the Personal Property Law, where the transaction of sale occurred prior to the effective date of the UCC. *Schwartz v. Macrose Lumber & Trim Co.*, 50 Misc. 2d 547 (1966), motion denied, 50 Misc. 2d 1055, 272 N.Y.S.2d 227 (1966), *rev'd* on other grounds, 29 A.D.2d 781, 287 N.Y.S.2d 706 (2d Dep't 1968), *aff'd*, 24

N.Y.2d 856, 301 N.Y.S.2d 91, 248 N.E.2d 920 (1969).

Agreements entered into prior to effective date of Code are regulated by pre-Code law as to filing priorities, remedies, and like under agreement. In *re Kokomo Times Publishing & Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968).

As to transactions occurring prior to effective date of Code, rights of parties must be determined in accordance with pre-Code law under Code § 10-101. *Redmond v. Lilly*, 273 N.C. 446, 160 S.E.2d 287 (1968).

As to transactions entered into before effective date of Code, Pre-Code law controlled and although parties were not precluded from refinancing transaction after effective date of Code to bring transaction within its provisions, transaction entered into on day before Code's effective date could not be "validly entered into" by agreement of parties as to applicability of Code. *Scott v. Stocker*, 380 F.2d 123 (10th Cir. Okla. 1967).

The interest of a secured party is determined by the prior law where the transactions occurred before the adoption of the Code. *American Sterilizer Co. v. Brown*, 378 F.2d 237 (2d Cir. N.Y. 1967).

Where corporations wrongfully transferred stock upon forged signatures of the plaintiff trustee, in November of 1962, and notice of the illegal transfers reached the plaintiff trustee in July of 1963, § 8-405 of the Uniform Commercial Code would not be applied prospectively to bar the plaintiff trustee's cause of actions against the corporations by estopping her from asserting the ineffectiveness of the forged indorsement. *Scovenna v. AT & T Co.*, 54 Misc. 2d 74 (1967).

Issues arising between an assignee for the benefit of creditors and the owner of machinery allegedly leased to the debtor are not controlled by the Uniform Commercial Code, where the lease agreement had been signed prior to the effective date of the Code. In *re Merkel, Inc.*, 46 Misc. 2d 270 (1965).

3. Refinancing of prior transaction.

UCC applied to pre-Code indebtedness secured by bill of sale to secure debt, where security agreement was substituted and financing statement filed after

Code was in effect. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

The Code applies to a security interest created before the effective date of the Code where there has been a refileing under the Code after its effective date. *Denis v. Shirl-Re Realty Corp.*, 4 U.C.C. Rep. Serv. 609 (1967, NY Sup).

A refinancing agreement and an agreement to amend a chattel mortgage are both subject to the Code where they are executed after the effective date of the Code although the original transaction occurred before the effective date of the Code. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

Refinance note dated May 15, 1963, and extension agreement dated June 1963, purporting to amend 1960 chattel mortgage securing 1960 notes were governed

by Code, which became effective on January 1, 1963; under Code § 10-101 (3), it is presumed that those portions of mortgage not so amended were satisfactory to parties in light of law at time of modifications. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

4. Breach of pre-code contract.

Long-arm statute, part of South Carolina Code (SC UCC §§ 2-801 to 2-809), applies to breach of contract and simultaneous accrual of cause of action after effective date of Code, even though contract was entered into before effective date of Code. *Deering Milliken Research Corp. v. Textured Fibres, Inc.*, 415 F.2d 875, 163 U.S.P.Q. 69 (4th Cir. S.C. 1969), on remand, 310 F. Supp. 491, 165 U.S.P.Q. 56 (D.S.C. 1970).

§ 75-10-102. Specific repealer; provision for transition.

(1) The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

(a) The Uniform Negotiable Instruments Act, being Sections 42 to 237, inclusive, of Chapter 3, Title 2, Mississippi Code of 1942, Recompiled, as amended;

(b) The Uniform Warehouse Receipts Act, being Sections 5012 to 5070, inclusive, of Chapter 16, Title 19, Mississippi Code of 1942, Recompiled;

(c) The Uniform Trust Receipts Act, being Sections 5080-01 to 5080-23, inclusive, of Chapter 17, Title 19, Mississippi Code of 1942, Recompiled, as amended;

(d) The Uniform Stock Transfer Act, being Sections 5359-01 to 5359-26 of Chapter 4, Title 21, Mississippi Code of 1942, Recompiled, as amended;

(e) Sections 243-01 to 243-10, inclusive, of Chapter 3A, Title 2, Mississippi Code of 1942, Recompiled, entitled "Assignment of accounts receivable";

(f) Section 268 of Chapter 7, Title 2, Mississippi Code of 1942, Recompiled, entitled "Statute of frauds-sales of personal property";

(g) Section 274 of Chapter 7, Title 2, Mississippi Code of 1942, Recompiled, entitled "To prevent fraudulent sales of merchandise-what presumed to be fraud" (commonly referred to as the "Bulk Sales Law");

(h) Section 337 of Chapter 5, Title 3, Mississippi Code of 1942, Recompiled, entitled "Purchase-money-lien on personal property";

(i) The "Factors Lien Act," being Sections 382-11 to 382-20, inclusive, of Chapter 5, Title 3, Mississippi Code of 1942, Recompiled;

(j) Section 851 of Chapter 2, Title 7, Mississippi Code of 1942, Recompiled, entitled "Chattel mortgages on property owned or to be acquired valid, when";

(k) Section 863 of Chapter 2, Title 7, Mississippi Code of 1942, Recompiled, entitled “Where conveyance of personal property recorded”;

(l) Section 870 of Chapter 2, Title 7, Mississippi Code of 1942, Recompiled, entitled “Foreign mortgages or (sic) personal property recorded”;

(m) Section 884 of Chapter 2, Title 7, Mississippi Code of 1942, Recompiled, entitled “Chattel record books”;

(n) Section 5218 of Chapter 2, Title 21, Mississippi Code of 1942, Recompiled, entitled “Collections may be forwarded direct”;

(o) Section 5218.5 of Chapter 2, Title 21, Mississippi Code of 1942, Recompiled, entitled “Dishonor or revocation of credit as to demand items”;

(p) Section 5278-02 of Chapter 2, Title 21, Mississippi Code of 1942, Recompiled, entitled “Stop payment of checks or drafts-limitations”;

(q) Section 5278-04 of Chapter 2, Title 21, Mississippi Code of 1942, Recompiled, entitled “Limitation of time for presentation of check”;

(r) Section 5278-11 of Chapter 2, Title 21, Mississippi Code of 1942, Recompiled, entitled “Final adjustment of statements of account by bank with its depositors”;

(s) Section 7880 of Chapter 7, Title 28, Mississippi Code of 1942, Recompiled, entitled “Bill of lading conclusive of receipts of goods”; and

(t) Section 7881 of Chapter 7, Title 28, Mississippi Code of 1942, Recompiled, entitled “Bank to retain money collected on bill of lading.”

(2) Transactions validly entered into before the effective date specified in section 75-10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this code as though such repeal or amendment has not occurred.

SOURCES: Codes, 1942, § 41A:10-102; Laws, 1966, ch. 316, § 10-102, eff March 31, 1968.

Cross References — Filing for perfecting security interests, see §§ 75-9-401 et seq. Repeal of inconsistent acts, see § 75-10-103.

JUDICIAL DECISIONS

1. In general.

The repeal of a statute abolishes it as though it never existed. Accordingly, the adoption of the Uniform Commercial Code (art 10) and the repeal of article 4 of the Personal Property Law effectively abolished a secured party's cause of action against a third-party tort-feasor for tortious destruction of collateral. *Bank of N.Y. v. Margiotta*, 99 Misc. 2d 423 (1979).

Where contract to supply fuel for one of plaintiff's two nuclear power plants, which was entered into before effective date of Florida Uniform Commercial

Code, bound plaintiff to buy and defendant to sell such fuel, and also granted plaintiff option to purchase fuel for a second nuclear power plant, and where such option was exercised by plaintiff after effective date of Florida Uniform Commercial Code, court held (1) that under Florida UCC §§ 10-101 and 10-102(2), provisions of Florida Uniform Commercial Code applied only to second fuel contract, which arose when plaintiff exercised option to purchase fuel for second power plant, and did not apply to original contract to furnish fuel for plaintiff's first

power plant, since plaintiff's exercise of option to purchase fuel for second power plant was not an "event" within meaning of Florida UCC § 10-101; and (2) that as a result, defendant could not rely on Florida UCC § 2-615(a) to excuse nonperformance of its obligations under the original fuel contract, but could rely on such statute with respect to nonperformance of its obligations under the second contract. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 579 F.2d 856 (4th Cir. Va. 1978).

Transitional provisions of UCC § 10-102(2) must be considered in construing term "events" in UCC § 10-101. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 579 F.2d 856, 24 U.C.C. Rep. Serv. 486 (4th Cir. Va. 1978) (applying Florida law; stating that while term "event" is not defined in Uniform Commercial Code, it is inconceivable that any duty imposed by precode law, which might have to be performed after effective date of adoption of the code, is an "event" contemplated by UCC § 10-101).

Where controlling events in interpleader action involving conflicting claims to proceeds of note occurred before effective date of Alabama's adoption of Uniform Commercial Code, transaction was governed by pre-UCC law pursuant to UCC § 10-102(2). *Blakeney v. Dee*, 363 So. 2d 313 (Ala. 1978), on remand, 363 So. 2d 316 (Ala. Civ. App. 1978).

Action for price of goods, wares and merchandise sold and delivered to buyer on open account was not time barred by the general statute of limitations of three years for oral contracts even though the purchases were incurred more than three but less than five years prior to filing of action, since, under UCC § 10-102 and 2-102, the five-year period of limitations of UCC § 2-725 superseded the pre-existing general statute and abrogated distinctions between oral and written sales contracts for purposes of statutes of limitations. *Sesow v. Swearingen*, 552 P.2d 705 (Okla. 1976).

Law in effect before adoption of UCC determined question whether repossession conditional vendor was required to sell collateral as condition to obtain deficiency judgment, even though property was re-

possessed after effective date of UCC, where contract was entered into prior to that date. *B & M Whsle. Co. v. Anchor Ranch, Inc.*, 96 Idaho 518, 531 P.2d 1163 (1975).

Mere fact that 22 of scheduled 24 installment payments upon promissory note were due after effective date of UCC in New York did not make Code applicable to note executed prior to effective date. In re *Appliance Packing & Warehousing Corp.*, 475 F.2d 1011 (2d Cir. N.Y. 1973).

Promissory note executed prior to effective date of Code was governed by pre-Code law, but second note dated after effective date of Code was separate transaction to which Code did apply. In re *Appliance Packing & Warehousing Corp.*, 358 F. Supp. 84 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1011 (2d Cir. N.Y. 1973).

Operative date for determining whether 4-year UCC or 6-year pre-code statute of limitations applied to action for breach of warranty was date when transaction was entered into, rather than date when action accrued. *Great Atl. & Pac. Tea Co. v. Rust Eng'g Co.*, 75 Misc. 2d 920 (1973).

Security agreement entered into 10 months before effective date of UCC in both Texas and North Dakota, is governed by prior law, even as to those aspects of transaction, including foreclosure, that took place after effective date of Code. *Empire Life Ins. Co. of Am. v. Valdak Corp.*, 468 F.2d 330 (5th Cir. Tex. 1972).

Security interest created prior to UCC could be perfected under UCC. In re *Midwest Eng'g Co.*, 425 F.2d 820 (10th Cir. Kan. 1970).

Mortgagee went into possession of goods in question approximately one month before Code became effective and about four months before mortgagor declared bankruptcy; question of priorities to chattels did not arise until bankruptcy occurred—three months after Code went into effect—since it was at date of bankruptcy that trustee had to assemble property of bankruptcy for administration; bankruptcy and continued possession of goods by mortgagee are controlling events, as far as present litigation is concerned; both of these events occurred after Code's effective date; held, according to Code, such events which occur after its

effective date are controlled by its provisions. *August v. Poznanski*, 383 Mich. 151, 174 N.W.2d 807 (1970).

Where note was dated May 2, 1961 and payable on demand or by May 5, 1962, and where Code became effective on September 1, 1963, question of whether one who for consideration assumes and pays obligation of accommodation maker on negotiable promissory note can sue principal maker on note was governed by repealed provisions of Negotiable Instruments Law under Code provision that transactions entered into prior to effective date of Code are to be enforced and terminated under prior law (apparently Code § 10-102(2)). *Jenks Hatchery, Inc. v. Elliott*, 252 Or. 25, 448 P.2d 370 (1968).

Under Code § 10-102, validity of sales held after effective date of Code was governed by pre-Code law, where mortgage agreement providing for such sale had been entered into prior to effective date of Code. *Phoenix v. Kovacevich*, 246 Cal. App. 2d 774 (5th Dist. 1966).

Issues arising between an assignee for the benefit of creditors and the owner of machinery allegedly leased to the debtor are not controlled by the Uniform Commercial Code, where the lease agreement had been signed prior to the effective date of the Code. *In re Merkel, Inc.*, 46 Misc. 2d 270 (1965).

§ 75-10-103. General repealer.

Except as provided in section 75-10-104, all laws and parts of laws inconsistent with this code are hereby repealed.

SOURCES: Codes, 1942, § 41A:10-103; Laws, 1966, ch. 316, § 10-103, eff March 31, 1968.

Cross References — Construction of this code so as to avoid implied repeal by subsequent legislation, see § 75-1-104.

JUDICIAL DECISIONS

1. In general.

The Business Sign Statute (§ 15-3-7) does not violate the Due Process Clause of the Fourteenth Amendment and was not repealed by implication in § 75-10-103, but was virtually continued by express direction in § 75-2-326(3)(a); furniture

and office equipment “used or acquired” in the business was subject to execution and sale under the statute. *Date Shoe, Inc. v. Nichols*, 642 F.2d 146 (5th Cir. Miss. 1981), reh’g denied, 647 F.2d 1121 (5th Cir. 1981).

§ 75-10-104. Laws not repealed.

The Chapter on Documents of Title (Chapter 7 of this Title) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailee’s businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (Section 75-1-201).

SOURCES: Codes, 1942, § 41A:10-104; Laws, 1966, ch. 316, § 10-104; Laws, 1996, ch. 468, § 70, eff from and after July 1, 1996.

Editor’s Note — Laws, 1996, ch. 468, § 72, provides as follows:

“SECTION 72. (a) This act does not affect an action or proceeding commenced before this act takes effect.

“(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.”

Cross References — Construction of this code so as to avoid implied repeal by subsequent legislation, see § 75-1-104.

Documents of title, see §§ 75-7-101 et seq.

CHAPTER 11

Uniform Commercial Code—Effective Date and Transition Provisions: 1977 Amendments

SEC.

- 75-11-101. Effective date.
 - 75-11-102. Preservation of old transition provision.
 - 75-11-103. Transition to revised U.C.C.; general rule.
 - 75-11-104. Transition provision on change of requirement of filing.
 - 75-11-105. Transition provision on change of place of filing.
 - 75-11-106. Required refilings.
 - 75-11-107. Transition provisions as to priorities.
 - 75-11-108. Presumption that rule of law continues unchanged.
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Editor's Note — The provisions of Chapter 452, Laws of 1977 referred to in this chapter, amended existing 1972 Code §§ 75-1-105, 75-1-201, 75-2-107, 75-5-116, 75-9-102, 75-9-103, 75-9-104, 75-9-105, 75-9-106, 75-9-203, 75-9-204, 75-9-205, 75-9-301, 75-9-302, 75-9-304, 75-9-305, 75-9-306, 75-9-307, 75-9-308, 75-9-312, 75-9-313, 75-9-318, 75-9-401, 75-9-402, 75-9-403, 75-9-404, 75-9-406, 75-9-407, 75-9-501, 75-9-502, 75-9-504 and 75-9-505, transferred existing 1972 Code § 75-9-408 to § 75-9-410, and added new 1972 Code §§ 75-9-408, 75-11-101, 75-11-102, 75-11-103, 75-11-104, 75-11-105, 75-11-106, 75-11-107 and 75-11-108.

§ 75-11-101. Effective date.

The provisions of Chapter 452, Laws of 1977, shall become effective on April 1, 1978. As used in this chapter, the term "old U.C.C." shall refer to the original Uniform Commercial Code adopted in 1967, and all amendments thereto and the term "revised U.C.C." shall refer to the old U.C.C. as amended by Chapter 452, Laws of 1977.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 2, eff from and after April 1, 1978.

§ 75-11-102. Preservation of old transition provision.

The provisions of section 75-10-102(2) shall continue to apply to the revised U.C.C., and for this purpose the old U.C.C. and the revised U.C.C. shall be considered one continuous statute.

SOURCES: Laws, 1977, ch. 452, § 37, eff from and after April 1, 1978.

§ 75-11-103. Transition to revised U.C.C.; general rule.

Transactions validly entered into after March 31, 1968 and before April 1, 1978, and which were subject to the provisions of the old U.C.C. and which would be subject to the amendments of Chapter 452, Laws of 1977 if they had been entered into after April 1, 1978 and the rights, duties and interests

flowing from such transactions remain valid after April 1, 1978 and may be terminated, completed, consummated or enforced as required or permitted by the revised U.C.C. security interests arising out of such transactions which are perfected on April 1, 1978, shall remain perfected until they lapse as provided in the revised U.C.C., and may be continued as permitted by the revised U.C.C., except as stated in section 75-11-105.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 3, eff from and after April 1, 1978.

§ 75-11-104. Transition provision on change of requirement of filing.

A security interest for the perfection of which filing or the taking of possession was required under the old U.C.C. and which attached prior to April 1, 1978 but was not perfected shall be deemed perfected on April 1, 1978 if the revised U.C.C. permits perfection without filing or authorizes filing in the office or offices where a prior ineffective filing was made.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 4, eff from and after April 1, 1978.

§ 75-11-105. Transition provision on change of place of filing.

(1) A financing statement or continuation statement filed prior to April 1, 1978 which shall not have lapsed prior to that date shall remain effective for the period provided in the old U.C.C., but not less than five (5) years after the filing.

(2) With respect to any collateral acquired by the debtor subsequent to April 1, 1978, any effective financing statement or continuation statement described in this section shall apply only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under the revised U.C.C.

(3) The effectiveness of any financing statement or continuation statement filed prior to April 1, 1978 may be continued by a continuation statement as permitted by the revised U.C.C., except that if the revised U.C.C. requires a filing in an office where there was no previous financing statement, a new financing statement conforming to section 75-11-106 shall be filed in that office.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 5, eff from and after April 1, 1978.

§ 75-11-106. Required refilings.

(1) If a security interest is perfected or has priority on April 1, 1978, as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under the revised Uniform

Commercial Code, the perfection and priority rights of the security interest shall continue until three (3) years after April 1, 1978. The perfection will then lapse unless a financing statement is filed as provided in Section 75-11-104 or unless the security interests is perfected otherwise than by filing.

(2) A financing statement may be filed within six (6) months before the perfection of a security interest would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by Chapter 452, Laws of 1977), state the office where and the date when the last filing, refileing or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice, however denominated, in another filing office under the old Uniform Commercial Code or under any statute or other law repealed or modified by Chapter 452, Laws of 1977, is still effective. Section 75-9-501 determines the proper place to file such a financing statement. Except as specified in this subsection, the provisions of Section 75-9-510 for continuation statements apply to such a financing statement.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 6; Laws, 2001, ch. 495, § 30, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, in (2), substituted “Section 75-9-501 determines” for “Section 75-9-401 and section 75-9-103 determine,” and substituted “Section 75-9-510” for “section 75-9-403(3)”; and made minor punctuation changes.

§ 75-11-107. Transition provisions as to priorities.

Except as otherwise provided in this chapter, the old U.C.C. shall apply to any questions of priority if the positions of the parties were fixed prior to April 1, 1978. In other cases, questions of priority shall be determined by the revised U.C.C.

SOURCES: Laws, 1977, ch. 452, § 37; Laws, 1978, ch. 401, § 7, eff from and after April 1, 1978.

§ 75-11-108. Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of the revised U.C.C. shall be deemed declaratory of the meaning of the old U.C.C.

SOURCES: Laws, 1977, ch. 452, § 37, eff from and after April 1, 1978.

CHAPTER 12

Uniform Electronic Transactions Act

SEC.

75-12-1.	Short title.
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75-12-35.	Acceptance and distribution of electronic records by governmental agencies.
75-12-37.	Interoperability.
75-12-39.	Severability clause.

§ 75-12-1. Short title.

This chapter may be cited as the Uniform Electronic Transactions Act.

SOURCES: Laws, 2001, ch. 400, § 1, eff from and after July 1, 2001.

§ 75-12-3. Definitions.

In this chapter:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) “Contract” means the total legal obligation resulting from the parties’ agreement as affected by this chapter and other applicable law.

(5) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) “Electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(7) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) “Governmental agency” means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) “Information” means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) “Security procedure” means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(15) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(16) “Transaction” means an action or set of actions occurring between two (2) or more persons relating to the conduct of business, commercial, or governmental affairs.

SOURCES: Laws, 2001, ch. 400, § 2, eff from and after July 1, 2001.

§ 75-12-5. Scope.

(a) Except as otherwise provided in subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) The Uniform Commercial Code other than Sections 75-1-107 and 75-1-206, Article 2 [(Section 75-2-101 et. seq. (sales))], and Article 2A [(Section 75-2A-101 et. seq. (leases))]; and

(3) Title 75, Chapter 1 General Provisions, other than Section 75-1-107 Waiver or Renunciation of Claim and Section 75-1-206 Statute of Frauds on Miscellaneous Personal Property.

(4) A statute, regulation or other rule of law governing adoption, divorce or other matters of family law. The provisions of this chapter shall not apply to court orders or notices, or official court documents (including briefs, pleadings and other writings) required to be executed in connection with court proceedings; any document required to accompany any transportation or handling of hazardous materials, pesticides or other toxic or dangerous materials; or any notice of (a) the cancellation or termination of utility services (including water, heat and power); (b) default, acceleration, repossession, foreclosure or eviction, or right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; (c) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or (d) recall of a product, or material failure of a product, that risks endangering health or safety.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection (b) to the extent it is governed by a law other than those specified in subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

SOURCES: Laws, 2001, ch. 400, § 3, eff from and after July 1, 2001.

Cross References — Uniform Commercial Code, see §§ 75-1-101 et seq.

Waiver or renunciation of claim or right after breach, see § 75-1-107.

Statute of frauds for kinds of personal property not otherwise covered, see § 75-1-206.

§ 75-12-7. Prospective Application.

This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2001.

SOURCES: Laws, 2001, ch. 400, § 4, eff from and after July 1, 2001.

§ 75-12-9. Use of electronic records and electronic signatures; variation by agreement.

(a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

SOURCES: Laws, 2001, ch. 400, § 5, eff from and after July 1, 2001.

§ 75-12-11. Construction and application.

This chapter must be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable law;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

SOURCES: Laws, 2001, ch. 400, § 6, eff from and after July 1, 2001.

§ 75-12-13. Legal recognition of electronic records, electronic signatures and electronic contracts.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

SOURCES: Laws, 2001, ch. 400, § 7, eff from and after July 1, 2001.

§ 75-12-15. Provision of information in writing; presentation of records.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d) (2), the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) To the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail, postage prepaid or regular United States mail, may be varied by agreement to the extent permitted by the other law.

SOURCES: Laws, 2001, ch. 400, § 8, eff from and after July 1, 2001.

§ 75-12-17. Attribution and effect of electronic record and electronic signature.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding

circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

SOURCES: Laws, 2001, ch. 400, § 9, eff from and after July 1, 2001.

§ 75-12-19. Effect of change or error.

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) Has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

SOURCES: Laws, 2001, ch. 400, § 10, eff from and after July 1, 2001.

§ 75-12-21. Notarization and acknowledgment.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

SOURCES: Laws, 2001, ch. 400, § 11, eff from and after July 1, 2001.

§ 75-12-23. Retention of electronic records; originals.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a).

(f) A record retained as an electronic record in accordance with subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this chapter specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

SOURCES: Laws, 2001, ch. 400, § 12, eff from and after July 1, 2001.

§ 75-12-25. Admissibility in evidence.

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

SOURCES: Laws, 2001, ch. 400, § 13, eff from and after July 1, 2001.

§ 75-12-27. Automated transaction.

In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.

SOURCES: Laws, 2001, ch. 400, § 14, eff from and after July 1, 2001.

§ 75-12-29. Time and place of sending and receipt.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

SOURCES: Laws, 2001, ch. 400, § 15, eff from and after July 1, 2001.

§ 75-12-31. Transferable records.

(a) In this section, "transferable record" means an electronic record that:

(1) Would be a note under Article 3 of the Uniform Commercial Code (Section 75-3-101 et. seq.) or a document Article 7 of the Uniform Commercial Code (Section 75-7-101 et. seq.) if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5) and (6), unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the transferable record was issued; or

(B) If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 75-1-201(20), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 75-3-302(a), 75-7-501 or 75-9-308 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

SOURCES: Laws, 2001, ch. 400, § 16, eff from and after July 1, 2001.

Cross References — Commercial paper under the Uniform Commercial Code, see §§ 75-3-101 et seq.

Documents of title under the Uniform Commercial Code, see §§ 75-7-101 et seq.

§ 75-12-33. Creation and retention of electronic records and conversion of written records by governmental agencies.

The executive authority of each governmental agency of this state shall determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records subject to applicable policies and standards of the Mississippi Department of Information Technology Services and the Mississippi Department of Archives and History as may be adopted pursuant to law.

SOURCES: Laws, 2001, ch. 400, § 17, eff from and after July 1, 2001.

Cross References — Mississippi Department of Information Technology Services, see §§ 25-53-1 et seq.

Mississippi Department of Archives and History, see §§ 39-5-1 et seq.

§ 75-12-35. Acceptance and distribution of electronic records by governmental agencies.

(a) Except as otherwise provided in Section 75-12-23(f), the executive authority of each governmental agency of this State shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a), the executive authority of the governmental agency, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(3) Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in Section 75-12-23(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

SOURCES: Laws, 2001, ch. 400, § 18, eff from and after July 1, 2001.

§ 75-12-37. Interoperability.

The governmental agency of this state which adopts standards pursuant to Section 75-12-35 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

SOURCES: Laws, 2001, ch. 400, § 19, eff from and after July 1, 2001.

§ 75-12-39. Severability clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SOURCES: Laws, 2001, ch. 400, § 20, eff from and after July 1, 2001.

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